(16,243 & 16,265.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 151.

AMBROSE P. S. STUART, APPELLANT,

vs.

KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA; AUGUST T. GRUETTER AND CHARLES F. JOERS.

FILED MARCH 30, 1896.

No. 160.

AUGUST T. GRUETTER AND CHARLES F. JOERS, APPELLANTS,

vs.

AMBROSE P. S. STUART AND KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA.

FILED APRIL 27, 1896.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Caption to transcript from United States circuit court of appeals...	1	1
Caption to transcript.....	2	1
Bill of complaint.....	2	1
Subpœna in chancery and marshal's return.....	5	4

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 22, 1897.

	Original.	Print.
Demurrer to bill of complaint	6	6
Order granting leave to amend bill of complaint	7	6
Order granting time to amend bill of complaint	8	7
Order sustaining demurrer to bill of complaint	8	7
Amended bill of complaint	8	8
Answer of Gruetter & Joers to amended bill of complaint	13	11
Order: leave to defendants Gruetter & Joers to file cross-bill	17	15
Answer of Ambrose P. S. Stuart to amended bill of complaint	17	15
Cross-bill of Gruetter & Joers	21	19
Report of condition of Capital National bank Dec. 9, 1892	23	20
Subpœna in chancery on cross-bill and marshal's return	29	25
Demurrer of Ambrose P. S. Stuart to cross-bill of Gruetter & Joers	30	26
Replication of receiver to answer of A. P. S. Stuart	32	28
Order overruling demurrer to cross-bill	33	29
Testimony for respondent Ambrose P. S. Stuart	33	29
Stipulation for taking testimony	33	29
Testimony of Ambrose P. S. Stuart	34	29
W. C. Brooks	96	83
Exhibit 1—Financial statement of Capital National bank	99	86
2—Financial statement of Capital National bank, July 3, 1890	99	87
3—Financial statement of Capital National bank	100	87
4—Financial statement of Capital National bank, July 9, 1889	100	88
5—Financial statement of Capital National bank, July 10, 1888	100	88
6—Transcript of record in case of Gruetter *et al. vs.* Stuart	101	89
Petition	101	89
Answer	103	90
Testimony for Kent K. Hayden, receiver	106	93
Stipulation for taking testimony	106	93
Stipulation extending time for taking testimony	106	93
Testimony of Kent K. Hayden	107	94
Deborah G. King	154	135
Henry Gerner	159	140
Augustus Theodore Gruetter	163	143
Charles F. Joers	177	156
Exhibit 1—Order of the Comptroller of the Currency for assessment of shareholders of Capital National bank	181	159
2—Stub No. 36 from stock certificate book	182	160
3—Stub No. 53 from stock certificate book	183	161
4—Copy of certificate of stock No. 36, to A. P. S. Stuart, for 100 shares	183	161
5—Copy of certificate of stock No. 53, to A. P. S. Stuart, for 50 shares	184	162
6—Stub No. 153 from stock certificate book	184	162
7—Stub No. 154 from stock certificate book	185	163
8—Stub No. 155 from stock certificate book	185	163
9—Copy of stock account of A. P. S. Stuart	186	164

	Original.	Print.
Exhibit 10—Copy of stock account of Gruetter & Joers	186	164
11—Copy of registry receipt	186	164
12—Notice of receiver of assessment upon the stockholders, June 10, 1893	187	166
13—Proceedings at special meeting of directors of Marsh National bank, May 23, 1884	188	166
14—Proceedings at stockholders' and directors' meeting, January, 1885	189	167
15—Proceedings at directors' meeting, July, 1885, and stockholders' meeting, January, 1886	190	168
16—Proceedings at directors' meeting, January, 1886, and stockholders' meeting, June, 1886	191	168
17—Proceedings at directors' meeting, June, 1886	191	169
18—Proceedings at directors' meeting, July, 1886, and October, 1886	192	169
19—Proceedings at directors' meeting, July 12, 1887	192	169
20—Proceedings at annual stockholders' meeting, January 10, 1888	193	170
21—Proceedings at directors' meeting, Jan. 10, 1888	194	170
22—Proceedings at directors' meeting, July 10, 1888	194	170
23—Proceedings at annual stockholders' meeting, July 8, 1889	195	171
24—Proceedings at directors' meeting, Jan., 1889	195	172
26—Proceedings at directors' meeting, July 9, 1889	196	172
27—Proceedings at annual stockholders' meeting, January 14, 1890	196	173
28—Proceedings at directors' meeting, July 11, 1890	197	173
29—Proceedings at annual stockholders' meeting, January 13, 1891	197	173
30—Proceedings at directors' meeting, Jan. 31, 1891	198	174
31—Proceedings at directors' meeting, July 13, 1891	198	174
32—Proceedings at meeting authorizing withdrawal of $50,000 United States bonds	199	175
33—Proceedings of stockholders' meeting, January 12, 1892	199	175
34—Proceedings at directors' meeting, Jan. 12, 1892	200	175
35—Proceedings at directors' meeting, July 12, 1892	200	176
36—Proceedings at directors' meeting, Feb. 20, 1892	200	176
37—Proceedings at directors' meeting, Jan. 22, 1893	201	176
38—List of bills receivable of the Capital National bank	201	176
39—List of bills receivable of the Capital National bank shown by the books, not on hand	210	185
40—Babbit's certificate of deposit register	220	194
41—Copy of certificate of deposit to J. E. Hill, treasurer, $50,000	220	194
42—Copy of certificate of deposit to J. E. Hill, treasurer, $37,975	220	194
43—Copy of certificate of deposit to H. R. Krug, $7,000	221	195
44—Copy of certificate of deposit to A. P. S. Stuart, $2,000	221	196

	Original.	Print.
Exhibit 45—Copy of certificate of deposit to J. E. Hill, State treasurer, $10,000	222	196
46—Copy of certificate of deposit to J. E. Hill, treasurer, $50,000	222	197
47 to 65—Copies from certain pages of interest-paid account	222	197
65—Tabulated statement of credit to interest-paid account	225	200
67—Copy of entry from individual balance book	226	201
68—Tabulated statement of surplus charged off	227	202
69—List of notes of Western Manufacturing Co.	228	203
70—Report of condition of Capital National bank, September 25, 1891	233	206
71—Report of condition of Capital National bank, March 1, 1892	234	206
72—Report of condition of Capital National bank, December 2, 1891	235	206
73—Report of condition of Capital National bank, May 17, 1892	236	206
74—Report of condition of Capital National bank, September 30, 1892	237	206
75—Registry receipt signed by Gruetter & Joers	2	207
76—Copy of certificate of deposit No. 27967, to A. P. S. Stuart, $5,000	240	208
77—Copy of certificate of deposit No. 26572, to A. P. S. Stuart, $2,000	240	208
78—Copy of certificate of deposit No. 27161, to A. P. S. Stuart, $2,000	241	209
79—Warranty deed, A. P. S. Stuart and wife to Charles Holland, December 5, 1893	241	211
80—Power of attorney, Charles Holland to A. P. S. Stuart, December 21, 1882	243	212
81—Report of financial condition of Capital National bank, December 9, 1892	245	213
Order granting leave to Stuart to file answer to cross-bill	247	214
Answer of Ambrose P. S. Stuart to cross-bill of complaint	247	214
Replication of Gruetter & Joers to answer of Stuart to cross-bill	251	218
Decree	252	219
Petition for appeal	254	220
Assignment of errors and order allowing appeal	255	221
Citation and acceptance of service	256	222
Bond on appeal	257	223
Clerk's certificate to transcript	259	224
Appearance of counsel for appellant	260	225
Appearance of G. M. Lambertson for appellees	260	225
Appearance of counsel for appellees Gruetter & Joers	261	225
Appearance of Amasa Cobb and A. E. Harvey for appellees	261	226
Order: cause submitted	262	227
Opinion of United States circuit court of appeals	263	227
Decree of United States circuit court of appeals	274	237
Petition for appeal and order allowing same	275	238
Assignment of errors	276	238

	Original.	Print.
Supersedeas bond	278	240
Citation and acceptance of service	282	243
Clerk's certificate to transcript	283	243
Caption to papers on appeal of Gruetter *et al.*	284	244
Petition of August T. Gruetter *et al.* for allowance of appeal	285	244
Assignments of error by Gruetter *et al.*	285	244
Order allowing appeal	287	246
Appeal bond	288	246
Original citation and acknowledgment of service	290	247
Clerk's certificate to transcript	292	248
Assignment of errors by Stuart	293	249

1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, 1895, of said court, begun and held at the United States court-house, in the city of St. Louis, Missouri, on the first Monday in December, to wit, the second day of December, A. D. 1895, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the twenty-sixth day of June, A. D. 1895, a transcript of record, in pursuance of an appeal allowed by the circuit court of the United States for the district of Nebraska, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit in the case of Ambrose P. S. Stuart, appellant, *vs.* Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, *et al.*, appellees; which said transcript of record is in the words and figures following, to wit:

2 Pleas before the Honorable John A. Riner, judge of the district court of the United States for the district of Wyoming, sitting in the circuit court of the United States for said district of Nebraska, within the eighth judicial circuit, at the term of January, A. D. 1895.

Be it remembered that on the 11th day of August, 1893, a bill of complaint was filed in the clerk's office of said circuit court; which said bill of complaint is in the words and figures following, to wit:

Bill.

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Plaintiff,
vs.
AMBROSE P. S. STUART, Defendant.

To the judges of the circuit court of the United States for the district of Nebraska:

Kent K. Hayden, receiver of the Capital National Bank of Lincoln, brings this his bill against Ambrose P. S. Stuart, and thereupon your orator complains and says that the said Capital National Bank of Lincoln is a banking association organized and lately doing business under and by virtue of the laws of the United States, and located within the State and district of Nebraska; that on or about the 23rd day of January, 1893, the said Capital National Bank of Lincoln failed, became and was insolvent, and the Comptroller of the Currency of the United States became and was satisfied of the insolvency of said national banking association; that thereupon,

on or about the 6th day of February, 1893, after due examination of the affairs of the said association, the said comptroller appointed one John D. Macfarland receiver of said Capital National Bank of Lincoln; that said John D. Macfarland qualified as such receiver, entered upon the duties of said office, took possession of said bank, its books, records, and assets, and proceeded to close up the said association; that on or about the 4th day of May of the year last aforesaid, the said John D. Macfarland resigned his said office of receiver of said bank, which said resignation was duly accepted by the said comptroller; that thereupon, and afterwards, the plaintiff was duly appointed receiver of the said Capital National
2½ Bank of Lincoln, by the said Comptroller of the Currency to succeed the said John D. Macfarland; that on or about the 31st day of May, 1893, the plaintiff having been duly appointed as aforesaid, duly qualified as such receiver of said Capital National Bank of Lincoln, entered upon the duties of said office, took possession of said bank, its books, records, and assets, proceeded to close up said association, and is now engaged in winding up the affairs of said bank.

2nd. Your orator further alleges that on or about the 10th day of June, 1893, the Comptroller of the Currency of the United States at the city of Washington in the District of Columbia, made, issued, declared, signed, sealed with the seal of his office, and published his order and proclamation of that date in and by which he declared that: Whereas, upon a proper accounting by the receiver theretofore appointed to collect the assets of the Capital National Bank of Lincoln, Nebraska, and upon a valuation of the uncollected assets remaining in his hands, it did appear to the satisfaction of said comptroller that in order to pay the debts of said association it is necessary to enforce the individual liability of the stockholders therefor to the extent thereinafter mentioned as prescribed by sections 5151 and 5234 of the Revised Statutes of the United States; that therefore by virtue of the authority in him vested by law, he did thereby make assessment and requisition upon the shareholders of the said Capital National Bank of Lincoln for three hundred thousand dollars, to be paid by them ratably on or before the 10th day of July, 1893, and he did thereby make demand upon each and every one of them, the said shareholders, for one hundred dollars upon each and every share of the capital stock of said association held or owned by them respectively at the time of its failure, and thereby direct your orator by the name and designation of K. K. Hayden, the receiver therefor appointed, to make all necessary proceedings by suit or otherwise, to enforce, to that extent, the individual liability of the said shareholders, of all of which the said Ambrose P. S. Stuart had notice.

3rd. Your orator further alleges and represents to your honors that on the 24th day of December, 1892, for a long time previous thereto, and thereafter down to the 3rd day of January, 1893, the said defendant was the owner and holder of and had standing in his name, one hundred and fifty shares of the capital stock of the said Capital National bank standing in his name upon the books of

said association, and that upon and for a long time previous to the said last-mentioned day, the said defendant was a director of the said Capital National Bank of Lincoln; that on said 24th day of December, 1892, for a long time prior thereto and up
3 to the said 3rd day of January, 1893, the said Capital National Bank of Lincoln was in a failing condition, and was in fact insolvent, which was known to said defendant personally as well as officially in his capacity as such director.

Your orator represents to your honors that said defendant being fully advised of and knowing the failing condition and insolvency of said bank, and in the expectation and anticipation of the early and near approaching failure of said bank, and the necessary enforcement of his liability as a shareholder of said bank, and to defraud the said bank, its depositors and creditors out of the security afforded by the law upon the shareholders of the national banks, and to render it impossible in case of the failure of the said bank which the said defendant believed and had reason to believe was im-inent and could not be long delayed, to place it out of the power of the Comptroller of the Currency to enforce the contingent liability of him, the said defendant, to contribute not to exceed one hundred cents on the dollar of the par value of the shares of stock owned and held by him as hereinbefore stated, in case of the failure of said bank and its inability to pay its depositors and other creditors out of the ordinary resources, and without resorting to an assessment upon its capital stock in the hands of its shareholders and for the purpose of avoiding such liability and cheating, wronging, and defrauding the said bank, its depositors and creditors, the Comptroller of the Currency, and the receiver of said bank of their lawful rights and remedies in the premises, did on or about the 3rd day of January, 1893, sell and cause to be transferred on the books of said bank, by proceeding regular in form, but which your orator, upon information and belief, alleges were and are colorable only, and not made in good faith, the one hundred and fifty shares of the capital stock of said Capital National Bank of Lincoln so owned and held by him as aforesaid to Gruetter and Joers whom your orator has been informed and believes and so charges upon information and belief, are and were at the date last aforesaid, pecuniarily irresponsible persons of or from whom the amount of such assessment of one hundred dollars upon each share of the said capital stock so owned and held by the said defendant, could not be made by legal process or otherwise. So that your orator by reason of the pretended sale and transfer of the said shares of stock by and from the said defendant to the said Gruetter and Joers and the insolvency of the said Gruetter and Joers and their pecuniary inability to respond in damages as hereinbefore set forth and stated, your orator is deprived of his remedy at law for the collection of so much of the assessment of three hundred thousand dollars made upon the capital stock
4 of said Capital National bank as is applicable to the one hundred and fifty shares thereof, owned and otherwise held by the said defendant. All of which actions and doings of the said defendant are contrary to equity and good conscience, and tend to

the manifest wrong, injury, and oppression of your orator in the premises. In tender consideration whereof, and forasmuch as your orator is entirely remediless by the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are properly cognizable to the end, therefore, that the said Ambrose P. S. Stewart, defendant, may full, true, direct and perfect answer make to all and singular the matters hereinbefore stated and charged, as fully and particularly as though the same were her-in-after repeated, and he thereunto distinctly interrogated, but the answer in or under oath of the said defendant is hereby waived; and the plaintiff prays that upon consideration thereof, your orators may find that the said defendant is the true and lawful owner of the one hundred and fifty shares of the capital stock of the Capital National bank hereinbefore mentioned, and may adjudge and decree that he pay to your orator the assessment thereon made by the (Comptroller) of the Currency as hereinbefore stated, to the sum and amount of fifteen thousand dollars, together with lawful interest on said sum from the 10th day of July, 1893, together with the costs of this action and a reasonable solicitors' fee for its conduct and prosecution; and that your orator may have such other and further relief in the premises as may be agreeable to equity and good conscience.

May it please your honors to grant unto your orators a writ of subpœna issuing out of this honorable court in equity to be directed to the said Ambrose P. S. Stuart, thereby commanding him under a certain penalty therein to be specified, to be and appear personally before your honors on a certain day then and there to answer all and singular the premises and to stand to and perform and abide such order and decree therein as to your honors shall seem meet, and the plaintiff shall ever pray.

COBB & HARVEY,
Solicitors for the Plaintiff.
G. M. LAMBERTSON,
Of Counsel for the Plaintiff.

Upon the back of said bill appear indorsements in the words and figures following, to wit: No. 69 "Q." Kent K. Hayden, receiver of the Capital National Bank of Lincoln, plaintiff, *vs.* Ambrose P. S. Stuart, defendant. Bill. Filed Aug. 11, 1893. Elmer D. Frank, clerk. Cobb & Harvey, attorneys for plaintiff.

5 Thereupon afterwards to wit: on the 11th day of August, 1893, a subpœna in chancery was duly issued in said case, and returned and filed August 16, 1893; which said subpœna is in the words and figures following, to wit:

UNITED STATES OF AMERICA, }
District of Nebraska, } *ss:*

The President of the United States of America to Ambrose P. S. Stewart, Greeting:

We command you to appear before the judges of the circuit court of the United States, for the district of Nebraska, at Omaha, on the

first Monday in September next, it being the fourth day of September, A. D. 1893, to answer the bill of complaint of Kent K. Hayden, receiver of the Capital National Bank of Lincoln, this day filed in the office of the clerk of said court, and then and there to receive and abide by such order and decree as shall then or thereafter be made, upon pain of the said bill being taken as confessed against you and decree pronounced accordingly.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Omaha, this 11th day of August, A. D. 1893, and of the Independence the 118th year.

[SEAL.] ELMER D. FRANK, *Clerk.*

Memorandum.

The above-named defendant is notified that unless he enter his appearance in the clerk's office of said court, at Omaha, aforesaid, on or before the day to which the above writ is returnable, as above stated, the complaint will be taken against him as confessed and a decree entered thereon accordingly.

ELMER D. FRANK, *Clerk.*

Attached to said subpœna is the return of the marshal in the words and figures following, to wit:

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 11th day of August, 1893, I received this subpœna and on the 12th day of August, 1893, I served the same upon the within-named Ambrose P. S. Stuart in Lancaster county, State and district of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

FRANK E. WHITE,
United States Marshal for the District of Nebraska,
By M. E. HUBBARD,
Deputy United States Marshal.

6 Upon the back of said subpœna appear indorsements in the words and figures following, to wit: No. 69 "Q." Circuit court of the United States, for the district of Nebraska, in chancery. Kent K. Hayden, receiver of the Capital National Bank of Lincoln, *vs.* Ambrose P. S. Stuart. Subpœna in chancery. Returnable to rule day first Monday in September, 1893. Elmer D. Frank, clerk. Filed Aug. 16, 1893. Elmer D. Frank, clerk. Cobb & Harvey, comp't's sol'rs. Marshal's costs. Service, $2.00. Mileage 3.48. Total $5.48.

Thereupon and afterwards, to wit: on the 27th day of September, 1893, a demurrer of Ambrose P. S. Stuart was filed in said case; which said demurrer is in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska, Plaintiff,
vs.
AMBROSE P. S. STUART, Defendant.

The demurrer of Ambrose P. S. Stuart (in the bill by mistake called Ambrose P. S. Stewart) to the bill of complaint of Kent K. Hayden, receiver, the above-named plaintiff.

This defendant, by protestation not confessing all or any of the matters and things in the plaintiff's bill of complaint contained, to be true in such manner and form, as the same *is* therein set forth and alleged, doth demur to the said bill, and for the cause of demurrer showeth that the plaintiff hath not in and by his said bill made or stated such a case as entitles him in a court of equity to any relief against this defendant, as to the matters contained in such bill, or any of such matters, and that plaintiff has a plain and adequate remedy at law.

And for further cause of demurrer, this defendant shows that it appears by the said plaintiff's said bill that Gruetter & Joers (the parties therein named as the alleged fraudulent transferees of the said shares of bank stock) are resident within the jurisdiction of this court, and are necessary parties to the said bill, and the said Gruetter & Joers are not named as parties thereto.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur thereto, and humbly demands the judgment of this court whether he shall be compelled to make any other and further answer to the said bill, and
7 hence asks to be dismissed of his costs and charges in this behalf most wrongfully sustained.

C. C. FLANSBURG,
Solicitor for Defendant.

I certify that, in my opinion, the above demurrer is well founded in point of law.

JAMES McNENY, *Of Counsel.*

STATE OF NEBRASKA, } ss:
Lancaster County, }

Ambrose P. S. Stuart, being first duly sworn, according to law, on his oath deposes and says that he is the defendant in the above-entitled case and that the demurrer therein is not interposed for delay.

AMBROSE P. S. STUART.

Subscribed in my presence, and sworn to before me, by Ambrose P. S. Stuart, this 27th day of September, 1893.

[SEAL.] VERNE L. LAFFERTY,
Notary Public in and for Lancaster County, Nebraska.

Upon the back of said demurrer appear indorsements in the words and figures following, to wit: No. 69 "Q." In the circuit court of the United States for the district of Nebraska. Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, plaintiff, *v.* Ambrose P. S. Stuart, def't. Demurrer. Filed Sept. 27, 1893. Elmer D. Frank, clerk. C. C. Flansburg, Lincoln, Neb., solicitor for def't.

Thereupon afterwards, at the November, 1893, term of said *term of said* court, on the 15th day of December, 1893, the following proceedings were had and done in said case, as appears of record on folio 135, Journal "S" of said court, to wit:

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Plaintiff,
vs.
AMBROSE P. S. STUART.

On motion of the complainant, by Cobb & Harvey, his solicitors, leave is hereby granted by the court to amend the bill of complaint herein by making new parties and otherwise in ten days from this date.

Thereupon afterwards at the January, 1894, term of said court, on the 9th day of January, 1894, the following proceedings
8 were had and done in said case, as appears of record on folio 263, Journal "S" of said court, to wit:

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln,
vs.
AMBROSE P. S. STUART.
} 69, "Q."

On motion of the complainant, by Cobb & Harvey, his solicitors, leave is hereby granted by the court to amend the bill of complaint herein by making new parties in five days from this date. Defendants *are* ruled to answer in fifteen days and complainant to reply in twenty days from this date. Cause continued.

Thereupon afterwards, at the January, 1894, term of said court, on the 9th day of February, 1894, the following proceedings were had and done in said case, as appears of record on folio 378, Journal "S" of said court, to wit:

KENT K. HAYDEN, Receiver,
vs.
AMBROSE P. S. STUART.
} 69, "Q."

This cause having been heard on the demurrer to the bill of complaint, the court does, after careful consideration thereof, now on this day sustain the same, and complainant is granted leave to amend the bill of complaint in ten days by making new parties de-

fendant and otherwise if desired. Defendant is ruled to answer in twenty days from date and complainant to reply in twenty-five days. Cause continued.

Thereupon afterwards, to wit: on the 21st day of Feb., 1894, an amended bill was filed in said case; which said amended bill is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska, Complainant,
vs.
AMBROSE P. S. STUART, AUGUSTUS T. GRUETTER and CHARLES F. JOERS, Copartners as Gruetter and Joers, Respondents.

To the judges of the circuit court for the district of Nebraska:

Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, brings this his amended bill against Ambrose
9 P. S. Stuart, Augustus T. Gruetter and Charles F. Joers, copartners as Gruetter & Joers, and thereupon your orator says:

That the said Capital National Bank of Lincoln, Nebraska, is a banking association organized and lately doing business under and by virtue of the laws of the United States, located within the State and district of Nebraska.

That the said Augustus T. Gruetter and Charles F. Joers are copartners in trade, engaged in the wholesale and retail business of buying and selling furniture at the city of Lincoln, Nebraska.

That said Ambrose P. S. Stuart is a resident of the city of Lincoln, and a resident and citizen of the State of Nebraska.

That on or about the 23rd day of January, 1893, the said Capital National Bank of Lincoln failed, and became and was insolvent and the Comptroller of the Currency of the United States became and was satisfied of the insolvency of said Capital National Banking Association; that thereupon, on or about the 6th day of February, 1893, after due examination of the affairs of the said association, the said comptroller appointed one John D. Macfarland receiver of said Capital National Bank of Lincoln; that said John D. Macfarland qualified as such receiver, entered upon the duties of said office, took possession of said bank, its books, records and assets, and proceeded to close up the said association. That on or about the 4th day of May, *to* the year last aforesaid the said John D. Macfarland resigned his said office of receiver of said bank, which said resignation was duly accepted by the said comptroller; that thereupon, and afterwards, the plaintiff was duly appointed receiver of the said Capital National Bank of Lincoln, by the said Comptroller of the Currency, to succeed the said John D. Macfarland; that on or about the 31st day of May, 1893, the plaintiff, having been duly appointed as aforesaid, duly qualified as such receiver of said Capital National Bank of Lincoln, entered upon the duties of said office, took possession of said bank, its books, records and assets, and proceeded to close up

said association, and is now engaged in winding up the affairs of said bank.

2. Your orator further alleges that on or about the 10th day of June, 1893, the Comptroller of the Currency of the United States at the city of Washington in the District of Columbia, made, issued, declared, signed, sealed with the seal of his office and published his order and proclamation of that date in and by which he declared that, whereas, upon a proper accounting by the receiver theretofore appointed to collect the assets of the Capital National Bank of Lincoln, and upon a valuation of the uncollected assets remaining in his hands, it did appear to the satisfaction of said comptroller that in order to pay the debts of said association it is necessary to enforce the individual liability of the stockholders therefor to the extent thereinafter mentioned as prescribed by sections 5151 and 5234 of the Revised Statutes of the United States; that therefore by virtue of the authority in him vested by law, he did thereby make assessment and requisition upon the shareholders of the said Capital National Bank of Lincoln for three hundred thousand dollars, to be paid by them ratably on or before the 10th day of July, 1893; and he did thereby make demand upon each and every share of the capital stock of said association held or owned by them respectively at the time of its failure, and thereby direct your orator by the name and designation of K. K. Hayden, the receiver theretofore appointed, to make all necessary proceedings by suit or otherwise to enforce, to that extent, the individual liability of the said shareholders, of all of which the said Ambrose P. S. Stuart and other respondents had notice.

3. Your orator further alleges and represents to your honors that on the 24th day of December, 1892, for a long time previous thereto, and thereafter down to the 3rd day of January, 1893, the said respondent Ambrose P. Stuart was the owner of and had standing in his name, one hundred and fifty shares of the capital stock of the said Capital National Bank of Lincoln, upon the books of said association, and that upon and for a long time previous to the said last-mentioned day the said defendant Ambrose P. S. Stuart was a director of the said Capital National Bank of Lincoln.

That on said 24th day of December, 1892, for a long time prior thereto and up to the said 3rd day of January, 1893, the said Capital National Bank of Lincoln was in a failing condition, and was in fact insolvent, which was known to said Ambrose P. S. Stuart personally, as well as officially in his capacity as such director.

Your orator further represents to your honors that said Ambrose P. S. Stuart respondent herein, being fully advised of and knowing the failing condition and insolvency of the said bank, and in the expectation and anticipation of the early and near approaching failure of the said bank, and the necessary enforcement of his liability as a shareholder, and to defraud the said bank, its depositors and creditors out of the security afforded by the law upon the shareholders of national banks, and to render it impossible in the case of

the failure of said bank which the said respondent believed
11 and had reason to believe was imminent and could not be long delayed, to place it out of the power of the Comptroller of the Currency to enforce the contingent liability of him the said respondent Ambrose P. S. Stuart to contribute not to exceed one hundred cents on the dollar of the par value of the shares of stock owned and held by him as hereinbefore stated, in case of the failure of said bank and its inability to pay its depositors and other creditors out of the ordinary resources, and without resorting to an assessment upon its capital stock in the hands of its shareholders, and for the purpose of avoiding such liability, and cheating, wronging and defrauding the said bank, its depositors and creditors, the Comptroller of the Currency and the receiver of the said bank, of their lawful rights and remedies in the premises, did on or about the 3rd day of January, 1893, sell and cause to be transferred on the books of the said bank, by proceeding- regular in form but which your orator upon information and belief avers were and are colorable only, and not made in good faith, the one hundred and fifty shares of the capital stock of the Capital National Bank of Lincoln, Nebraska, so owned and held by him as aforesaid, to Gruetter & Joers, whom your orator has been informed and believes and so charges upon information and belief, are and were at the date last aforesaid, pecuniarily irresponsible persons of or from whom the amount of such assessment of one hundred dollars upon each share of the said capital stock so owned and held by the said respondent Ambrose P. S. Stuart, could not be made by legal process or otherwise. So that your orator by reason of the pretended sale and transfer of the said shares of stock by and from the said respondent Ambrose P. S. Stuart, to the said respondents Gruetter and Joers and the insolvency of the said Gruetter and Joers, and their pecuniary inability to respond in damages as hereinbefore stated and set forth, your orator is deprived of his remedy at law for the collection of so much of the assessment of three hundred thousand dollars made upon the capital stock of the said Capital National bank as is applicable to the one hundred and fifty shares thereof owned and otherwise held by the said respondent Ambrose P. S. Stuart; all of which actions and doings of the said respondent are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator in the premises.

In tender consideration whereof, and forasmuch as your orator is entirely remediless by the strict rules of the common law, and can only have relief in a court of equity where matters of this kind are properly cognizable, to the end therefore, that the said
12 Ambrose P. S. Stuart and said Gruetter & Joers, respondents herein, may full, true, direct, and full answer make to all and singular the matters hereinbefore stated and charged as fully and particularly as though the same were hereinafter repeated, and they thereunto distinctly interrogated, but the answer in or under oath of the said respondents is hereby waived.

And the complainant prays that upon consideration thereof, your honors find that the said respondent Ambrose P. S. Stuart is the

true and lawful owner of the said one hundred and fifty shares of the capital stock of the Capital National bank hereinbefore mentioned, and that the transfer of the said shares of stock by the said Ambrose P. S. Stuart, to the said Gruetter & Joers may be set aside, and may adjudge and decree that he pay to your orator the assessment thereon made by the Comptroller of the Currency as hereinbefore stated, to the sum and amount of fifteen thousand dollars, together with lawful interest on said sum from the 10th day of July, 1893, together with the costs of this action and a reasonable solicitors' fee for its conduct and prosecution; and that your orator may have such other and further relief in the premises as may be agreeable to equity and good conscience.

May it please your honors to grant unto your orator a writ of subpœna issuing out of this honorable court in equity, to be directed to the said Ambrose P. S. Stuart, and the said Augustus T. Gruetter and Charles F. Joers copartners as Gruetter & Joers, thereby commanding them under a certain penalty therein to be specified, to be and appear personally before your honors on a certain day then and there to answer all and singular the premises, and to stand to and perform and abide such order and decree therein as to your honors shall seem meet, and your orator will ever pray.

COBB & HARVEY,
Solicitors for Complainant.
G. M. LAMBERTSON, *Of Counsel.*

Upon the back of said amended bill appear indorsements in the words and figures following, to wit:

No. 69 "Q." Kent K. Hayden, receiver, *vs.* A. P. S. Stuart *et al.* Amended bill. Filed Feb. 21, 1894, Elmer D. Frank, clerk. Cobb & Harvey, & G. M. Lambertson, solicitors for complainant.

Thereupon afterwards, to wit, on the 24th day of February,
13 1894, an answer of Gruetter & Joers to amended bill was filed in said case; which said answer is in the words and figures following, to wit:

Answer of Gruetter & Joers to Amended Bill.

In the Circuit Court of the United States for the District of Nebraska.

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska, Complainant,
vs.
AMBROSE P. S. STUART, AUGUST T. GRUETTER and CHARLES F. JOERS, Copartners as Gruetter & Joers, Respondents.

The joint and several answers of August T. Gruetter and Charles F. Joers to the amended bill of complaint of the complainant, Kent K. Hayden.

These defendants respectively, now and at all times hereafter (expecting) and reserving unto themselves all and all manner of

benefit, advantage or exception or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in said bill of complaint contained, for answer thereunto, or unto so much *as* to such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto, answering say:

These defendants admit that the Capital National Bank of Lincoln, Nebraska, mentioned in said bill of complaint, is a banking association organized and lately doing business under and by virtue of the laws of the United States, and located within the State and district of Nebraska.

These defendants deny that they are copartners in trade and engaged in the wholesale and retail business of buying and selling furniture at the city of Lincoln, Nebraska.

These defendants admit that the said Ambrose P. S. Stuart is a resident of the city of Lincoln, and a resident and citizen of the State of Nebraska, and admit that on or about the 23rd day of January, 1893, the said Capital National Bank of Lincoln failed and became and was insolvent, and the Comptroller of the Currency of the United States became and was satisfied of the insolvency of said Capital National Banking Association, and that thereupon, on or about the 6th day of February, 1893, after due examination of the affairs of said association, the said comptroller appointed one John D. Mcfarland, receiver of said association, who qualified as such and entered upon the duties of said office and took possession of
14 said bank, its books, records and assets; and that afterwards the said Mcfarland resigned his said office as such receiver, and that thereafter on or about the 31st day of May, 1893, the complainant having been duly appointed and qualified as receiver of said association as a successor of the said Mcfarland, took possession of said bank, its books, records, and assets, and is now engaged in winding up its affairs.

And these defendants further admit that afterwards and on or about the 10th day of June, 1893, the Comptroller of the Currency of the United States, duly made, issued and declared, signed and sealed his certain order and proclamation of that date, in which he decreed and determined as set forth in said bill of complaint, that it was and is necessary to enforce the individual liability of the stockholders of said bank, and made a requisition upon such stockholders for the sum of three hundred thousand dollars ($300,000), to be paid ratably on or before the 10th day of July, 1893, and directed the complainant to take all necessary proceedings by suit or otherwise to enforce to that extent the individual liability of said shareholders, of all of which the said Stuart had notice.

These defendants further admit that on the 24th day of December, 1892, and for a long time prior thereto and thereafter, down to the 3rd day of January, 1893, the said Stuart was the owner of and had standing in his name upon the books of said bank, one hundred fifty (150) shares of the capital stock thereof, and that for a long time prior to the said last-named date said defendant Stuart was director of said bank, and that on said 24th day of December,

and for a long time prior thereto, and up to the said 3rd day of January, 1893, the said Capital National Bank of Lincoln, was in a failing condition and was in fact insolvent; which was known to the said Stuart personally, as well as officially in his said capacity as such director.

And these defendants further admit and allege and aver the fact to be, that the said Ambrose P. S. Stuart, one of the respondents herein, being fully advised of and knowing the failing condition and insolvency of the said bank, and in the expectation and anticipation of the early and near approaching failure of the said bank, and the necessary enforcement of his liability as a shareholder therein, with the intent and purpose as well to defraud the said bank, its depositors and creditors of the security afforded by the law upon the shareholders of national banks, and to render it impossible in case of the failure of said bank, which the said defendant believed and had reason to believe was imminent, and not long to be delayed, to place it out of the power of the Comptroller of the Currency to enforce his liability as such shareholder, and with the intent and for the purpose as well of avoiding such liability — cheat, wrong and defraud the said bank, its depositors and creditors of their lawful rights, and remedies in the premises, as also to cheat, wrong, and defraud these defendants and to subject these defendants to liability as shareholders in said bank, to the creditors and depositors thereof, on or about the 23rd day of December, 1892, wrongly, falsely, fraudulently and unlawfully for the purpose and intent aforesaid, represented, stated and warranted to these defendants, that he, the said Stuart well knew the condition of the said bank, and the value of the said shares of stock, and that said bank was in a safe and solvent condition, and abundantly able to pay its indebtedness, and that said stock was fairly and reasonably worth the sum of at least $1.25 per share, or $18,000 in all, and proposed and urged that these defendants should accept said stock at said sum and valuation of $18,000 upon, and as a part of the purchase price of certain real estate, to wit: of lot- Nos. five (5), and six (6), in block numbered thirty-four (34) according to the original plat of the town, now city of Lincoln, Nebraska, which these defendants were then about to sell, and did sell to the said defendant Stuart, for the agreed price of $37,500, subject to a certain mortgage indebtedness and lien thereon; which these defendants say the said premises were fairly and reasonably worth.

And these defendants further say that being wholly ignorant in the premises and relying wholly and implicitly upon the said statements and representations of the said defendant, and believing them to be true, these defendants did on or about said last-named day, sell and convey said property to said Stuart for said sum, subject to said encumbrance, and did receive from said defendant an assignment of said shares of stock, to wit, 150 shares of the nominal of the face amount of $100 each, and for the said sum of $18,000 as a party of the said purchase price of said property; which said assignment was made to these defendants by the name of Gruetter & Joers, yet these defendants aver that at, and for a long time prior to said 23rd

day of December, 1892, and at and before the time of the making of the representations by the said defendant, and at and before the date of the sale and conveyance of said property by these defendants to said Stuart, and the assignment by him to them of the shares of said stock, the said Stuart well knew that said bank was
16 wholly insolvent and wholly unable to pay its debts and that said shares of its capital stock were not only wholly valueless but that if these defendants should receive and accept an assignment thereof from the said Stuart, they, by so doing, would subject themselves to liability of an assessment thereon, by the Comptroller of the Currency for the benefit of its creditors and depositors.

And these defendants further aver that not until long after the transfer and assignment of said shares of stock from the said Stuart to these defendants on or about the 3rd day of January, 1893, nor in fact until on or about the 21st day of January, 1893, did these defendants or either of them have any notice or knowledge that the said bank was insolvent or that it was financially embarrassed or that any or all of the statements hereinbefcore mentioned, made by the said Stuart to these defendants, were not in fact true.

And so these defendants admit that the said proceedings by which the said shares of stock were assigned and transferred from the said Stuart to these defendants, was not made in good faith, but was colorable only and made for the purpose, as well to cheat, wrong, and defraud these defendants, as to avoid the liability and responsibility of the said Stuart as a shareholder in said bank.

And these defendants admit that since the said sale of the said property by these defendants to the said Stuart, and the receipt by them from said Stuart of said shares of stock in part payment thereof, as aforesaid, and by reason of said fact and circumstances, these defendants became, have been and are pecuniarily irresponsible and unable to respond in damages to the plaintiff in this action.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged; without these, that there is not any matter, cause or thing in the said complainant's said bill of complaint contained, material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of these defendants; all of which matters and things these defendants are ready and willing to aver, maintain and prove, as this honorable court shall direct and respectfully pray to be hence dismissed with their reasonable *cause* (costs) and charges in this behalf most wrongfully sustained.

AMES & PETTIS,
Attorneys for Defendants Gruetter & Joers.

Upon the back of said answer appear indorsements in the words and figures following, to wit: No. 69 "Q." Kent K. Hay-
17 den, receiver, *vs.* Ambrose P. S. Stuart, August T. Gruetter & Chas. F. Joers. Answer of Gruetter & Joers to amended bill. Filed Feb. 24, 1894. Elmer D. Frank, clerk.

Thereupon afterwards, at the January, 1894, term of said court, on the 12th day of March, 1894, the following proceedings were had and done in said case, as appears of record on folio 476, Journal "S" of said court, to wit:

KENT K. HAYDEN, Receiver, Complainant,
vs.
A. P. S. STUART, AUGUST T. GRUETTER, CHARLES F. JOERS, Respondents. } 69, "Q."

MARCH 12TH, 1894.

Ordered that the defendants, August T. Gruetter and Charles F. Joers, be permitted to file a cross-bill herein 12 March, 1894.
(Signed) ELMER S. DUNDY, *Judge.*

Thereupon afterwards, to wit: on the 19th day of March, 1894, an answer of respondent Ambrose P. S. Stuart was filed in said case, which answer is in the words and figures following, to wit:

Answer of Respondent Ambrose P. S. Stuart to the Amended Bill of Complaint of Kent K. Hayden, Complainant.

In the Circuit Court of the United States for the District of Nebraska.

KENT K. HAYDEN (Receiver of the Capital National Bank of Lincoln, Nebraska), Complainant,
vs.
AMBROSE P. S. STUART, AUGUSTUS T. GRUETTER and CHARLES F. JOERS (Copartners as Gruetter & Joers), Respondents.

This respondent now, and at all time hereafter, saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or so much thereof as this respondent is advised that it is material or necessary for him to make answer thereto, answering, saveth:

That on the 16th day of December, 1892, this respondent was the owner and holder of, and has standing in his name one hundred fifty shares capital stock of the said Capital National bank, upon the books of the said association, and that on said day he
18 entered into a contract with his said codefendants Augustus T. Gruetter and Charles F. Joers (under the firm name of Gruetter & Joers) by the terms of which he agreed to purchase, and did purchase, of the said Gruetter & Joers, their certain brick business block, situated on lots D, E, & F subdivision of lots five (5) and (6), of block thirty-nine (39) of the original plat of Lincoln, Nebraska, at an alleged and agreed consideration of $67,500.00.

That there was upon said building at said time a valid existing mortgage indebtedness of $30,000, drawing 6 per cent. interest, upon

which there was accumulated interest at that time, which mortgage and interest, it was agreed respondent should assume and pay off and discharge, as a part of said agreed consideration for said transfer.

It was further then and there agreed that the said one hundred fifty shares of capital stock of the said Capital National bank then held and owned by this respondent, Ambrose P. S. Stuart, should be received by Augustus T. Gruetter and Charles F. Joers (copartners as Gruetter & Joers) at and as of the value of $18,000, and it was further agreed that the taxes thereon, amounting to $250.00, *was* to be paid by the respondent, and the balance of said consideration, amounting to $18,124.34, agreed upon in the sale of said property, was to be paid in cash by this respondent; and on said day, and to bind the said bargain between the said parties, this (respondant) drew his check upon the said Capital National bank, in favor of the said Gruetter & Joers, for the sum of one thousand — ($1,000) which check was presented by the said Gruetter & Joers to the said Capital National bank, and the money received thereon.

That afterwards, and on the 22nd day of December, 1892, the said Augustus T. Gruetter and Charles F. Joers made, executed, and delivered to this respondent a good and sufficient deed to the said premises, pursuant to the said agreement theretofore entered into, and upon said date, and at the time of the delivery of said deed, this respondent wrote his name in blank upon the back of the 150 shares of stock of the said Capital National bank, under the power of attorney thereon, and delivered the same to Augustus T. Gruetter and Charles F. Joers, and the balance of said consideration due and owing to the said Augustus T. Gruetter and Charles F. Joers was paid in the manner following—that is to say: This respondent had a certificate of deposit on the said Capital National bank, in amount $5,000; and another certain certificate of deposit on the said Capital National bank of $2,085.00; and another certificate of deposit on the said Capital National bank of $2,050; and a certain bank book
19 on the Industrial Savings Bank of Lincoln, Nebraska, upon which there was then due $2,000; a certain savings-bank book on the Lincoln savings bank, on which there was due $1,426.84; a certain other certificate of deposit of $1,250.00 on the Industrial Savings Bank of Lincoln, Nebraska, and a certain check of $312.50, drawn on the said Capital National Bank of Lincoln, Nebraska, and all of said certificates of deposit, bank books and checks were by this respondent made payable to the order of the said Augustus T. Gruetter and Charles F. Joers (partners as Gruetter & Joers), and were duly indorsed to them, and the said Augustus T. Gruetter and Charles F. Joers did present the same, and did receive thereon the amount of $17,124.34 in cash, which together with the $1,000 paid on the 16th day of December, 1892, at the time the bargain was made, made a total of $18,124.34, which this respondent paid to the said Augustus T. Gruetter and Charles F. Joers, at the time of the transfer of the said one hundred fifty shares of capital stock of the said Capital National bank.

That the interest upon said mortgage, amounting to $900.00 and the taxes upon said premises, amounting to $250.00 were paid by

this respondent upon the completion of the said trade, and the delivery of the said deed to this respondent.

That the said Augustus T. Gruetter and Charles F. Joers (copartners as Gruetter & Joers) at the time of the said transfer, were engaged in the business of retail furniture sellers, in the city of Lincoln, Nebraska, and were not at this time, as this respondent has been informed and believes, and so answers upon information and belief, insolvent and pecuniarily irresponsible, as charged in complainant's bill, but respondent charges the fact to be that at the time of the said transfer of the said Capital Bank stock, said respondent had no knowledge whatever of the financial condition of the said Augustus T. Gruetter and Charles F. Joers (partners as Gruetter & Joers) but the said Gruetter & Joers had at that time a stock of furniture and carpets of about the value of $20,000.00, and this respondent paid to them, together with said bank stock, the sum of $18.124.34 in cash.

And said respondent further says that he had no knowledge whatever of the condition of the said bank, nor did he know that the said bank was insolvent, but at the time of the transfer of said shares of stock, this respondent believed the bank to be in a good condition, and perfectly solvent, and at the time of the said transfer, this answering defendant had no expectation or anticipation of any failure of the said bank, or change in its condition; nor did he have any expectation of the enforcement of his liability as a shareholder of the said bank, but made the said transfer to the said Augustus T. Gruetter and Charles F. Joers (partners as Gruetter & Joers) in good faith, and for a valuable consideration, and that at the time of the said transfer, the said Gruetter & Joers were in possession of the said business property of the value of $67,500, and that the stock of furniture and carpets at that time in their possession was of the value of $20,000.00, and respondent paid to them, when he delivered said bank stock, the sum in cash of $18,124.34, and respondent had no reason to believe nor did he believe that the said defendants Augustus T. Gruetter and Charles F. Joers (of the said firm of Gruetter & Joers) were insolvent, or in contemplation of insolvency, but believed, and still believes, that they were at that time perfectly solvent, and able to respond to any call for an assessment upon the stock, had it then been made.

That the said transfer of the said bank stock upon the book of the said Capital National bank was made by some other person than this respondent; that upon the sale and transfer being made as aforesaid, respondent delivered the said certificate of stock, duly indorsed in blank to the said Augustus T. Gruetter and Charles F. Joers (copartners as Gruetter & Joers) since which time it has been out of his possession, and in the possession of said Gruetter & Joers.

That the complainant herein has made no attempt or effort to collect the said assessment from the said Augustus T. Gruetter and Charles F. Joers (partners as Gruetter & Joers) although the legal title to the said shares of stock is in the said Gruetter & Joers, and not in this respondent.

That on or about the 23rd day of January, 1893, the said defend-

ants Gruetter & Joers commenced an action in the district court of Lancaster county, Nebraska, against this respondent, which is still pending and undetermined, affirming and alleging the validity of the said contract of transfer of the said one hundred fifty shares of stock to them, and seeking damages against this respondent, by reason of the said one hundred fifty shares of bank stock having been rendered worthless, because of the insolvency of the said Capital National bank, and this respondent denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other answer, cause or thing in the said complainant's bill of complaint contained material or necessary for the respondent to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied is true to the knowledge or be-
21 lief of this respondent; all of which matters and things, this respondent is ready and willing to aver, maintain and prove, as this honorable court shall direct, and humbly prays to be dismissed of his costs and charges in this behalf most wrongfully sustained.

AMBROSE P. S. STEWART,
By C. C. FLANSBURG,
His Solicitor.

STATE OF NEBRASKA, } ss:
Lancaster County, }

On this 14th day of March, 1894, before me, the undersigned, a notary public, duly commissioned and qualified in and for said county, appeared Ambrose P. S. Stuart, who, being duly sworn according to law, on his oath says that the allegations in the foregoing answer are true.

Subscribed in my presence and sworn to before me this 14th day of March, 1894.

——— ———.

Upon the back of said answer appear indorsements in the words and figures following, to wit: No. 69 "Q." Circuit court of the United States for the district of Nebraska. Kent K. Hayden (receiver), complainant, *vs.* Ambrose P. S. Stuart *et al.*, respondents. Answer of respondent Ambrose P. S. Stuart. Filed Mar. 19, 1894. Elmer D. Frank, clerk. C. C. Flansburg, solicitor for answering respondent.

Thereupon afterwards, to wit, on the 20th day of March, 1894, cross-bill of defendants Gruetter & Joers was filed in said case; which said cross-bill is in the words and figures following to wit:

In the Circuit Court of the United States for the District of Nebraska.

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska, Complainant,
vs.
AMBROSE P. S. STUART, AUGUST T. GRUETTER and CHARLES F. JOERS, Copartners as Gruetter & Joers, Respondents.

Cross-bill of Defendants Gruetter & Joers against the Complainant and the Defendant Ambrose P. S. Stuart.

To the honorable the judges of the circuit court of the United States for the district of Nebraska:

The defendants in the above-entitled cause, August T. Gruetter and Charles F. Joers, bring this their cross-bill of complaint against the defendant in said cause, Ambrose P. S. Stuart, and against
22 the complainant therein, Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, and thereupon your orators say:

That your orators and the said defendant, Ambrose P. S. Stuart, and the complainant Kent K. Hayden, are residents of the city of Lincoln and State of Nebraska, and citizens of said State, and that the amount, sum and value in controversy herein exceeds the sum of two thousand dollars exclusive of interest and costs, and that said controversy arises under the Constitution and laws of the United States.

And further your orators complain and show that hitherto and on and prior to the 23rd day of December, 1892, your orators were the owners of a certain tract of real estate situate in the city of Lincoln, Lancaster county, Nebraska, particularly described as being lots D & E & F of Baldwin's subdivision of lots numbers five (5), and six (6), in block No. thirty-four (34), according to the original record plat of the town, now city of Lincoln aforesaid, upon which there was a mortgage to secure an indebtedness of thirty thousand dollars; and that on or about said day the above-named defendant Ambrose P. S. Stuart was the owner in his own name of one hundred fifty shares of the nominal or face amount of one hundred dollars each of the Capital National Bank of Lincoln, Nebraska, a corporation organized and doing business as a bank association at Lincoln, Nebraska, under the national banking act of the United States, and standing in his name upon the books of said bank;

And that on or about and immediately prior to said day, the said defendant Stuart, falsely and fraudulently and for the purpose and with the intent among other things to cheat and defraud your orators, represented and stated and warranted to your orators that he, the said defendant, well knew the condition of the said bank and the value of said shares of stock, and that said bank was in a safe and solvent condition, and abundantly able to pay its debts, and that said stock was fairly and reasonably worth the sum of at least $125 per share, or $18,000 in all; and proposed and urged

that your orators should accept said stock at said sum and valuation of $18,000 upon and as part of the purchase price of said real estate, which your orators were then about to sell and did sell to said def-ndant, for the agreed price of $37,500 subject to said mortgage indebtedness and lien, which sum was the fair and reasonable and market valuation thereof.

And your orators further represent and show unto your *orators* that on the 17th day of December, 1892, one R. C. Outcalt,
23 who was then and for ten years prior thereto had been the cashier of said Capital National bank, and one C. W. Mosher, who was then and for ten years prior thereto had been the president of said Capital National bank, and one C. E. Yates and one R. O. Phillips, who then and for many years prior thereto had been directors of said Capital National bank, caused under and in pursuance of the direction and authority of the said bank and of its board of directors, to be published in the Nebraska State Journal, a daily newspaper of general circulation in said city of Lincoln, a certain statement purporting to be a copy of a report of the condition of said bank to the Comptroller of the Currency of the United States at the close of its business on December 9, 1892, which statement as so published was in the words and figures following, that is to say:

"*Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business December* 9, 1892.

Resources.

Loans and discounts	$768,601 44
Overdrafts secured and unsecured	6,217 74
United States bonds to secure circulation	50,000 00
Stocks, securities, etc	325 00
Due from approved reserve agents	107,090 01
Due from other national banks	17,800 33
Due from State banks and bankers	5,394 72
Banking-house furniture and fixtures	5,770 00
Other real estate & mortgages owned	38,617 92
Current expenses and taxes paid	14,286 28
Checks and other cash items	3,698 56
Exchanges for clearing-house	8,841 16
Bills of other banks	2,355 00
Fractional paper currency, nickels & cents	298 71
Specie	26,789 50
Legal-tender notes	17,431 00
Redemption fund with U. S. Treasurer, (5 per cent. of circulation)	1,350 00
Total	$1,074,867 37

24 Liabilities.

Capital stock paid in		$300,000 00
Surplus fund		6,000 00
Undivided profits		21,180 75
National bank notes outstanding		45,000 00
Individual deposits subject to check	$356,139 33	
Demand certificates of deposit	158,545 88	
Due to other national banks	81,574 14	
Due to State banks and bankers	47,372 89	
		643,632 24
Notes and bills rediscounted		59,054 38
Total		$1,074,867 37

STATE OF NEBRASKA, } ss:
County of Lancaster, }

I, R. C. Outcalt, cashier of the above-named bank do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 15th day of December, 1892.

HAL C. YOUNG,
Notary Public.

Correct.
Attest:
C. W. MOSHER,
C. E. YATES,
R. O. PHILLIPS, *Directors.*"

And your orators further represent and show unto your honors, that on or about or immediately prior to said 23rd day of December, 1892, and before making the said trade and exchange with the said Stuart of said property for said stock, your orator applied to the said R. C. Outcalt to ascertain the condition of said bank, and the value of said stock, informing said Outcalt at the time, that the reason of said inquiry was that your orators were contemplating the purchase of 150 shares of the stock of said bank, and that the said Outcalt in response to said application and inquiry, assured your orators that the said stock was of the fair and reasonable value of $125.00 per share, and that said bank was in a solvent and prosperous condition.

Your orators further represent and show unto your honors, that being wholly ignorant in the premises and relying solely and implicitly upon the said statements and representations of the said defendant Stuart and upon the said statement so published
25 in said newspaper, and the statements and assurances of the said Outcalt, and believing all and every of them to be true, your orators did on or about said last-named day, sell and convey

the said property to the said Stuart for said sum of $37,500.00 subject to said incumbrance, that being the fair and reasonable and market value thereof, and received from said defendant an assignment of said stock as for the sum of $18,000 as part of the purchase price of said property, which assignment was made to your orators by the name of Gruetter & Joers.

And your orators further represent and show unto your honors that long prior to the 23rd day of December, 1892, the said defendants Ambrose P. S. Stuart had been, and that he then was one of the directors of said Capital National bank, and at and before the time of making said representations to said defendants, and at and before the date of the sale and conveyance of said property by your orators to the said Stuart and the assignment by him to them of the said shares of stock, the said defendant Stuart, and the said R. C. Outcalt, cashier, and the said C. W. Mosher, president, and the said C. E. Yates and R. O. Phillips, directors of the said Capital National bank, well knew that said bank was wholly insolvent and unable to pay its debts, that the said shares of its capital stock were not only wholly valueless but were subject and liable to be assessed by the Comptroller of the Currency to the full nominal or par amount thereof, for the payment of the creditors and depositors of said bank, and that the proceeds of such assessment together with all the property and assets of said bank was and would be insufficient for the payment of its said creditors and depositors.

And your orators further represent and show unto your honors that the said officers and directors of said bank and the said defendant Stuart made such statements and representations and warranties to your orators and induced and prevailed upon your orators to convey to said defendant said property and receive from him an assignment of said shares of stock and to procure the transfer thereof upon the books of said bank, from said defendant to your orators, with the deliberate attempt and purpose not only to cheat and defraud your orators out of the said sum of $18,000, which your orators paid to the said Stuart as consideration for the shares as aforesaid, but also to subject your orators in the stead of said Stuart to liability of *liability of* assessment and payment to the amount of the full par value, being $15,000 of said shares of stock, for the benefit of
26 the depositors and creditors of said bank, and enable the defendant thereby to escape and evade his own liability on such assessment as such shareholder.

And your orators further represent and show unto your honors that being wholly in ignorance of the real facts and circumstances with respect to the financial condition and insolvency of said bank, and of the intent, object and purposes of the said defendant Stuart in said transaction, and of the falsity of the said statements and representations by the said officers and directors of said bank, but implicitly relying thereon and fully believing the said bank to be in a solvent and prosperous condition, and said shares to be of the fair and reasonable market value of not less than $125.00 each, your orators did accept an assignment thereof from the said defendant and did procure and consent on or about the 3rd day of January,

1893, to the transfer thereof to your orators upon the books of said bank, and that your orators remained so wholly ignorant of the said several facts and circumstances and of the said intent and purpose of the said defendant Stuart, until on or about the 21st day of January, 1893, when said bank failed and ceased to do business and in consequence thereof was taken (charg-) of by the United States bank examiner.

And your orators further represent and show unto your honors that afterwards and on or about the 6th day of February, 1893, after due examination of the affairs of said bank, the Comptroller of the Currency appointed one John D. Macfarland receiver of said bank, who was duly qualified as such, who afterwards resigned, and on or about the 4th day of May in the year last aforesaid, the complainant, Kent K. Hayden was duly appointed as receiver of said bank by the Comptroller of the Curreney, and afterward duly qualified as such receiver and entered upon the duties of said office, and took possession of the books, records and assets of said bank, and proceeded, and is now proceeding to close up the affairs of said association, and to collect its assets and distribute the same among its creditors.

And your orators further allege that on or about the 10th day of June, 1893, the Comptroller of the Currency made, issued and declared, signed, sealed and published an order of proclamation of that date in which he declared that, whereas, on the proper accounting by the receiver theretofore appointed to collect the assets of the Capital National Bank of Lincoln, Nebraska, and upon the valuation of the uncollected assets remaining in his hands, it appeared to the satisfaction of said comptroller that in order to pay the debts of said (assiciation), it is necessary to enforce the individual
27 liability of the stockholders thereof to the extent thereinafter mentioned; that therefore by virtue of the authority in him vested by law, he did thereby (made) assessment and requisition upon the shareholders of said Capital National bank, for the sum of $300,000, being the full par amount of the capital stock of said bank to be paid to him ratably on or before the 10th day of July, 1893; and did thereby (made) demand upon each and every shareholder of said association for an amount equal to the full par amount of the number of shares held or owned by him respectively, and thereby directed the said Hayden, receiver, to take all necessary proceedings by suit or otherwise, to enforce to that extent the individual liability of said (sh-reholders).

And your orators further represent and show unto your honors that for several years prior to the said 3rd day of January, 1893, and upon and until said date, the said defendant was the owner of and had standing in his name upon the books of said bank, the said 150 shares of the capital stock thereof and had been and was a director in said bank, and was well and familiarly acquainted with its condition and affairs, and of the amount of its indebtedness, and of the value of its assets and resources, and was, as were also the said R. C. Outcalt, C. W. Mosher, C. E. Yates, and R. O. Phillips, and for a long time previous to said last-named date and previous

to said 23rd day of December, 1892, and previous to the said 9th day of December, 1892, had known and were fully aware that said bank was insolvent and that said shareholders would be required to pay the full par value of the stock for the satisfaction of its depositors and creditors.

All of which said actings and doings of the said Stuart and of the said Capital National bank by and through its officers and directors as aforesaid, were contrary to equity and good conscience, and tend to the manifest wrong and injury and oppression of your orators in the premises.

In tender consideration whereof, and forasmuch as your orators are entirely remediless by the strict rules of the common law, and can only have relief in the court of equity where matters of this kind are properly cognizable to the end therefore that the said Ambrose P. S. Stuart and Kent K. Hayden may full, true, and direct answer make to all and singular the matters heretofore stated and charged as fully and freely as though same were hereinafter repeated, and they thereunto distinctly (int-rrogated) respecting the same, but not under oath, answer under oath being hereby expressly waived; and that upon consideration thereof, your honors
28 may find that the said Ambrose P. S. Stuart is, notwithstanding and because — the matters and facts hereinbefore alleged and referred to, still the true and lawful owner of said 150 shares of capital stock of said Capital National bank hereinbefore mentioned, and is solely liable to, and for the payment of the said assessment thereon by the said Comptroller of the Currency, and that said assignment and transfer by the said defendant to your orators was fraudulent and void, both as against your orators and as against the complainant, the receiver of said bank, and said depositors and creditors, and that said bank, and said depositors and creditors, and that said transfer and assignment ought to be, and shall be, by a decree of this court, wholly cancelled and set aside and your orators not only released from any liability or responsibility by reason thereof, but the said Stuart be adjudged and declared to make a full restitution to your orators of the said sum of $18,000, so paid by your orators to said Stuart upon the purchase of said stock, together with interest thereon, from the 23rd day of December, 1892, and the costs of this action, and a reasonable solicitors' fee for its conduct and prosecution; and that for the sum so adjudged to be paid by said defendant to your orators upon the cancellation of said transfer and assignment, execution may be awarded in behalf of your orators and against said Stuart as upon a judgment at law, and that your orators may have such other and further or different relief in the premises as may be agreeable to equity and good conscience, they hereby bringing into court the said certificates of said shares of stock and tendering and offering to deliver the same to the said Stuart or to make such other disposition thereof as this court may order.

May it please your honors to grant unto your orators, the most gracious writ of subpœna issuing out of this honorable court in equity to be directed to the said Ambrose P. S. Stuart and Kent K.

Hayden, thereby commanding them under a certain penalty therein to be specified, to be and appear personally before your honors on a certain day and at a certain place therein to be named, and then and there to answer all and *single* the premises and to stand to, perform and abide by such order and decree therein as to your honors shall seem meet, and your orators shall ever pray.

AMES & PETTIS,
Solicitors for Cross-complainants, Gruetter & Joers.

F. H. WOODS, *Of Counsel.*

Upon the back of said cross-bill appear indorsements in the words and figures following, to wit: No. 69 "Q." Kent K. Hay-
29 den, receiver, *vs.* Ambrose P. S. Stuart, August T. Gruetter, and Chas. F. Joers. Cross-bill of defendants Gruetter & Joers. Filed Mar. 20, 1894. Elmer D. Frank, clerk. Ames & Pettis, sol'rs for cross-complainants.

Thereupon afterwards, on the 20th day of March, 1894, a subpœna on cross-bill was duly issued in said case and returned and filed March 22, 1894; which said subpœna is in the words and figures following, to wit:

UNITED STATES OF AMERICA, } ss.:
District of Nebraska, }

The President of the United States of America to Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, and Ambrose P. S. Stuart, Greeting:

We command you and each of you to appear before the judges of the circuit court of the United States for the district of Nebraska, at Omaha, on the first Monday in May next, it being the seventh day of May, A. D. 1894, to answer to the cross-bill of complaint of August T. Gruetter and Charles F. Joers, copartners as Gruetter & Joers, this day filed in the office of the clerk of said court, and then and there to receive and abide by such order and decree as shall then or thereafter be made, upon pain of the said cross-bill being taken as confessed ag-inst you and decree pronounced accordingly.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Omaha, this 20th day of March, A. D. 1894, and of the Independence the 118th year.

[SEAL.] ELMER D. FRANK, *Clerk.*

Memorandum.

The above-named defendants are notified that unless they enter their appearance in the clerk's office of said court, at Omaha, aforesaid, on or before the day to which the above writ is returnable as above stated, the cross-complaint will be taken against them as confessed, and a decree entered thereon accordingly.

ELMER D. FRANK, *Clerk.*

Attached to said subpœna is the return of the marshal in the words and figures following, to wit:

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 20th day of March, 1894, I received this subpœna in chancery, and on the 21 day of March, 1894, I served the same upon the within-named Kent K. Hayden, receiver of the Capital National bank, Lincoln, and Ambrose P. S. Stuart, in Lancaster county, State and district of Nebraska, by delivering to, and leaving with each a certified copy thereof, with all the indorsements thereon.

FRANK E. WHITE,
United States Marshal for the District of Nebraska.

Upon the back of said subpœna appear indorsements in the words and figures following, to wit: No. 69 "Q." Circuit Court of the United States for the district of Nebraska, in chancery. Gruetter & Joers, cross-complainants, *vs.* Ambrose P. S. Stuart *et al.* Subpœna in chancery. Returnable to rule day first Monday in May, 1894. Elmer D. Frank, clerk. Filed March 22, 1894. Elmer D. Frank, clerk. Ames & Pettis, cross-comp'ts' sol. Marshal's costs. Service, $4.00. Subsistence, .50. Mileage, 3.30. Total, $7.80.

Thereupon afterwards, to wit, on the 5th day of May, 1894, demurrer of Ambrose P. S. Stuart to the cross-bill was filed in said case; which said demurrer is in the words and figures following, to wit:

In the Circuit Court of the United States within and for the District of Nebraska.

KENT K. HAYDEN, Complainant,
vs.
AMBROSE P. S. STUART *et al.*, Respondents.

The demurrer of Ambrose P. S. Stuart, respondent, to the cross-bill of Augustus T. Gruetter and Charles F. Joers, complainants in said cross-bill.

This respondent, by protestation, not confessing all or any of the matters and things in the cross-bill of the said Augustus T. Gruetter and Charles F. Joers contained to be true in such manner and form as the same *is* therein set forth and alleged, doth demur to said cross-bill, and for cause of demurrer showeth that the said cross-complainants h*ath* not in and by their said bill made or stated such a case as entitles them in a court of equity to any relief against this respondent as to the matters contained in the said bill or any of such matters.

II. That the said cross-bill doth not contain any matter of equity whereon this court can ground any decree or give to the cross-complainants any relief against this respondent.

III. That the said cross-complainants are not entitled upon said cross-bill to the relief for which they pray, because they have a plain and adequate remedy at law.

31 IV. That the court hath no jurisdiction over either the subject-matter in the said cross-complaint set forth, nor over the parties hereto.

V. That the said matters and facts alleged in the said cross-bill are not properly the subject of a cross-bill; neither make or state such a case as in any manner constitutes a defense to the original bill of complaint filed herein, and no relief is asked therein against the complainant in the original bill, Kent K. Hayden, receiver.

VI. That the cross-bill attempts to litigate an independent matter between the respondents to the original bill, without in any manner interposing the same as a defense to the original bill, and without in any way connecting the subject-matter of the cross-bill with the matters contained in the original bill.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this respondent doth demur thereto, and humbly demands the judgment of this court whether he shall be compelled to make any further answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

AMBROSE P. S. STUART,
By C. C. FLANSBURG, *His Solicitor.*

I certify that in my opinion the above demurrer is well founded in point of law.

JAMES McNENEY, *Of Counsel.*

STATE OF NEBRASKA, }
Lancaster County, } ss:

Ambrose P. S. Stuart, being first duly sworn, according to law, on his oath says that he is the respondent named in the cross-complaint in the above-entitled case, and that the demurrer therein is not interposed for delay.

A. P. S. STUART.

Subscribed in my presence, and sworn to before me this 5th day of May, 1894.

VERNE L. LAFFERTY,
[SEAL.] *Notary Public within and for Lancaster County, Neb.*

Upon the back of said demurrer appear indorsements in the words and figures following, to wit: No. 69 "Q." Circuit court of
32 the United States for the district of Nebraska. Kent K. Hayden, complainant, *vs.* Ambrose P. S. Stuart *et al.*, respondents. Demurrer of Ambrose P. S. Stuart to the cross-bill of Augustus T. Gruetter and Charles F. Joers, complainants in said cross-bill. Filed May 5, 1894. Elmer D. Frank, clerk. C. C. Flansburg, solicitor for respondent Stuart.

Thereupon afterwards, to wit, on the 14th day of May, 1894, a replication of Kent K. Hayden, receiver, was filed in said case; which said replication is in the words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Nebraska. In Equity.

KENT K. HAYDEN, Receiver Capital National Bank,
vs.
A. P. S. STUART. } 69, "Q."

The Replication of Kent K. Hayden, Receiver of Capital National Bank, Plaintiff, to the Answer of A. P. S. Stuart, Defendant.

This repliant, saving and reserving unto himself now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto say- that *they* will aver, maintain and prove his said bill of complaint to be true, certain and sufficient in the law to be answered unto, and that the said answer *to* the said defendant — uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is, and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly pray- as in and by his said bill of complaint he has already prayed.

G. M. LAMBERTSON,
Solicitor for Plaintiff.

Upon the back of said replication appear indorsements in the words and figures following, to wit: No. 69 "Q." U. S. circuit court, district of Nebraska, in equity. Kent K. Hayden, receiver, *vs.* A. P. S. Stuart. Replication. Filed May 14, 1894. Elmer D. Frank, clerk. Cobb & Harvey, G. M. Lambertson, solicitors for plaintiff.

Thereupon afterwards, at the May, 1894, term of said court,
33 on the 30th day of July, 1894, the following proceedings were had and done in said case, as appears of record on folio 69, Journal "T" of said court, to wit:

KENT K. HAYDEN, Receiver,
vs.
AMBROSE P. S. STUART *et al.* } 69, "Q."

This cause having been heard on the demurrer of the defendants to the cross-bill herein, and the court being fully advised in the premises, doth now on this day order, adjudge and decree that said demurrer be and the same is hereby overruled.

Defendants to said cross-bill are ruled to answer to the same in twenty days from this date.

Thereupon afterwards, to wit, on the 15th day of March, 1895, testimony on behalf of respondent was filed in said case; which said testimony is in the words and figures following, to wit:

KENT K. HAYDEN, Receiver Capital National Bank,
vs.
A. P. S. STUART. } 69, "Q."

In the Circuit Court of the United States for the District of Nebraska.

KENT K. HAYDEN, Receiver of the Capital National Bank, Complainant,
vs.
AMBROSE P. STUART, Respondent.

Testimony for the Respondent.

Appearances: Messrs. Cobb & Harvey and G. M. Lambertson, for the receiver; Messrs. Harwood, Ames & Pettis, for Gruetter & Joers, cross-petitioners; C. C. Flansburg, for the respondent, A. P. S. Stuart.

Testimony taken at Lincoln, Nebraska, February 20, 1895, at 10 o'clock a. m., at the office of Harwood, Ames & Pettis, pursuant to the following agreement:

It is hereby stipulated by and between the parties hereto that Miss Grace Waring may take depositions and testimony of the
34 witnesses called by and on behalf of the respondent, Ambrose P. S. Stuart, in this case; that the same may be taken in shorthand by her and duly transcribed at length, and that the said evidence when so written and prepared by her shall be of the same force and effect, and be used in the same way and in like manner as if taken on a commission granted or before a regular examiner of this court.

It is further stipulated that the said Grace Waring, as deputy clerk of the United States district court for the district of Nebraska, may administer the oath to the said witnesses called and examined at this time.

It is further stipulated that the said Grace Waring may certify and transmit the said depositions the same as depositions taken *de bene esse*, and they shall have the same effect as if certified to be the examiner.

It is further stipulated and agreed that the time of taking testimony in this case may be extended to the first day of March, 1895.

AMBROSE P. S. STUART, a witness of lawful age, being by me first duly sworn, testified as follows, viz:

Examined by Mr. FLANSBURG:

Q. State your name, age and place of residence.

A. My name is Ambrose P. S. Stuart and I reside in Lincoln, Nebraska, am 74 years old.

Q. How long have you resided in Lincoln, Nebraska?

A. I have resided here since 1875, between 19 and 20 years now.

Q. Were you at any time connected with the Capital National Bank of the City of Lincoln?

A. I was.

Q. When did your connection with that institution cease?

A. It ceased about the 16th of December, 1892.

Q. Were you a stockholder at that time?

A. Just before that I was.

Q. Up to that time?

A. Yes; up to that time.

Q. How much stock did you have up to the 16th day of December, 1892?

A. I had $15,000 of stock for several years; the first amount that I had was $10,000. I don't remember just how long it remained $10,000, but when the capital was increased from $200,000 to $300,000 I took $5,000 more.

Q. What became of this $15,000 in bank stock on the 16th day of December, 1892, or about that time?

35 A. I traded it for a block held by Gruetter & Joers, as part payment for it.

Q. Was that described as lots D, E and F, of Baldwin's subdivision of lots 5 and 6 in block No. 34?

A. Block No. 39.

Q. Block No. 39, according to the original recorded plat of the town, now city of Lincoln, Nebraska?

A. Yes, sir.

Q. You say that was a part of the consideration for the purchase of this property, the description of which was given above?

A. Yes, sir.

Q. State what the balance of the consideration was?

A. The balance of the consideration was cash, between $19,000 and $20,000, $19,500 or thereabouts, and an assumption of a mortgage of $30,000.

Q. Upon the premises?

A. Yes, sir.

Q. Were you a director of the bank at this time, at the time that you negotiated this stock?

A. Yes, sir.

Q. How long had you been a director?

A. Several years; I don't remember just the number of years, from about the time that the bank came up to the corner here of 11th and O, I don't now just remember the date of the transfer of the bank from the Commercial block up to this corner.

Q. How much of your time had you given to the affairs of that bank during the time you were a director?

A. Well, I was one of the committee to examine the paper, the bank paper, and I suppose used to give it, take something like a day or such a matter once in some three months perhaps.

Q. What further time did you give to the duties of the office, if any?

A. Well, I don't think that I gave very much time to the duties of the office except when I was in the bank, I was in the bank almost every day.

Q. Who had the active management of the bank?

A. Well, the president and cashier.

Q. Give their names?

A. C. W. Mosher and R. C. Oucalt.

Q. What did you know concerning the condition of the bank on the 16th day of December, 1892?

A. Well, I didn't know anything but that everything was all right, with this exception, that there was a part of the stock locked up in real estate and when that was sold, as I was given to understand that it would be, and was being sold at the time that
36 we had a conversation about the matter, that then the capital would be all right again, that was what I understood to be the facts in the case.

Q. That was your idea then of the condition of the bank at that time?

A. Why yes, I didn't know anything about really the condition of the bank as to being, as they called, insolvent; I supposed it was all right.

Q. Now, you testified that you transferred the bank stock that you held, 150 shares, as a part payment of the premises described above?

A. Yes, sir.

Q. How did you happen to make that trade or exchange, Professor, tell the circumstances leading to it?

A. Well, a gentleman by the name of Crooks called at my office one day and wanted me to buy the Gruetter block, as it was called.

Lamberston objects to his stating any conversation had with Crooks as hearsay, incompetent, irrelevant and immaterial.

Q. Go on.

A. And I answered that I was not prepared, that I could not buy it, that I had not money enough to buy it. The thing lay in my mind in this way.

Lamberston objects as to his stating what he had in his mind, as not binding, incompetent.

Q. State all the conversation with Crooks, what he said to you and what you said to him?

A. I said I hadn't money enough to buy it, and I supposed that would be the end of it, and intended to have the end of the matter, but he seemed to think that I could buy it, and he stated what it could be had for, and that there was a mortgage of $30,000 on it, and that the place could be had for some $67,500 I think. Well, I said that I had not that amount of money and I did not see how I could make the trade. Finally this thought was suggested, I forget whether by myself or my wife: The bank stock could be taken in as part, and I said, then, that if they chose to take my bank stock I wasn't particular about selling it, but if they chose to take that,

possibly I could raise money enough in cash by assuming the mortgage to pay for the block, and that was the substance of what passed, I think, between us until having seen the other parties, Mr. Crooks——

Q. I just asked you for the conversation with Crooks at that time?

A. Yes, sir, that was the substance of it.

37 Q. Now, when did you see Mr. Crooks again?

A. Well, he came to my office, well from six to ten times perhaps, somewhere along there; I don't know; quite a number of times, and talked the matter over; there was perhaps nearly a week more or less consumed in the talking of the matter over.

Q. Did you and Mr. Crooks finally arrive at an agreement upon this property?

A. We did.

Q. What did you do then?

A. Well, after we came to an agreement I gave Mr. Crooks a check for $1,000 to take to the parties, Mr. Gruetter and Joers, to bind the bargain.

Q. Then what conversation further did you have, if any, with him after this?

A. With Mr. Crooks?

Q. Yes, sir; if any.

A. I don't recall any conversation in particular about the matter until we went down to consum-ate the trade, about the exchange of papers. I have it in my books; I don't remember now just the dates, but I could turn to it if I had my book with me. Went down to Mr. Gruetter's office. Meanwhile I had been down there, I think, once to go over the building and look at it, examine it. Then I went down with Mr. Crooks and we passed the papers. I gave him certificates of deposit amounting to $9,000 and checks and so on, so as to make up to $19,500.00 or thereabouts.

Q. This was down at the building, wasn't it, in the office of Gruetter & Joers, that this was finally consummated?

A. Yes, sir.

Q. Did you have any conversation down there with Gruetter and Joers and Mr. Crooks in their presence in regard to the bank stock or the condition of the bank?

A. Yes; there was some conversation.

Q. State what that conversation was.

A. Well, I said that so far as I knew the bank stock was all right. I told them that there was a block of it locked up in real estate; that my understanding was that when that real estate was sold and the money obtained therefore and put back, that the capital would be then unimpaired, it would be all right again, and that was what I actually thought and what I had been given to understand by the officials of the bank.

Q. Was there any further conversation there at that time in regard to what the stock was worth?

A. I told them that I had been offered, I think, 25 cents premium

some time before, and that I had concluded at that time, when
38 Cross offered, not to sell, because I thought it was yielding me more than I could get for my money anywhere else.

Q. And then you turned the stock over and the certificates of deposit over, and the money, and accepted their deed, did you?

A. Yes, sir; I did; and also a lease.

Q. Was that a part of the consideration in this transfer?

A. Well, yes; it was understood that if the trade was made that they were to lease the building from me for a term of ten years, at $6,000.00 a year.

Q. And you say that lease was turned over at that time to you?

A. It was.

Q. You assumed the mortgage of $30,000.00 at that time in that deed, you say?

Lamberston objects as leading.

A. Yes, sir; I assumed that.

Q. State what, if anything, you have paid on that, either at that time or subsequently.

Lambertson objects as incompetent, irrelevant and immaterial.

A. Well, I have not paid anything except the interest on it.

Q. And the deed was turned over to you at that time and the lease at the time the exchange was made?

A. Yes, sir.

Q. When did you say this was?

A. I could not say just now the day it was. I could tell if I had my books here; I don't remember just the day, but it was not far from the 20th or somewhere along there.

Q. The 20th of what?

A. December.

Q. What years?

A. 1892.

Q. Had you known the members composing this firm prior to this transaction?

A. I had known of them and had some slight acquaintance with them. I knew that they had been in the furniture business over here in Mr. Harwood's block, Harwood and Ames block, for quite a number of years, and my understanding was——

Lambertson objects to his stating his understanding as incompetent, irrelevant and immaterial.

Witness continues:—was that they had been very successful in business there.

Q. State what you know about their solvency or apparent solvency at that time.

39 A. Why, I supposed that they were solvent, that was what I considered them.

Q. What did they have in sight besides $19,500.00 that you turned over to them at that time?

A. Well, they had a large stock of furniture.

Q. I will ask you to state, Mr. Stuart, what your intention was of disposing of this bank stock.

Lambertson objects as incompetent.

A. Why, my intention was, to be able to make the trade, could not do it in any other way.

Q. I will ask you, if you had any fraudulent intentions in disposing of this bank stock?

Lambertson objects as leading and incompetent.

A. No; no fraudulent intention whatever, as honest a trade as I ever made.

Q. You heard the testimony of Mr. Hayden, the receiver in this case, did you not?

A. I did.

Q. You heard his testimony in regard to the interest-paid and interest-received account?

A. Yes, sir.

Q. Do you know anything about the interest-paid account?

A. I don't think that I saw the book, interest-paid account book; that was kept in some other place where I didn't see it. The interest-received book used to lie right on Mr. Outcalt's table, and I saw that two or three times a week; it was (*a*) very convenient of access and I used to look at it almost—not every day, but I used to look into it to see how the amount of receipts figured up, and usually in the course of six months they figured up to somewhere in the neighborhood of $40,000, more or less.

Q. I hand you exhibits marked 1, 2, 3, 4, and 5, and ask you to examine those, and state, if you know, in whose handwriting they appear.

A. Well, I judge these are in C. W. Mosher's handwriting. These two I could not say.

Q. Exhibits 1, 2, and 3, you say are in Mosher's handwriting?

A. Yes, sir; I could not say whose handwriting these others are in, probably some of the clerks in the bank.

Q. Did you ever see these papers before?

A. Yes, sir.

Q. State when and under what circumstances.

A. Well, they were delivered to the board of directors at the time of the meetings, when dividends were declared, and those purport to be statements of receipts and expenses paid.

40 Lambertson objects to his stating what they purport to be as incompetent and immaterial.

Q. Go on?

A. Those are the statements of the receipts of the bank, each one of those for six month- and of the expenses paid, and taken as I suppose right from the books.

Lambertson objects to the statement of which they are, they show for themselves; and also objects to the statement of the witness that he supposes that they are taken from the books.

Q. You may state who had them when you first saw them, and for what purpose.

A. Had what?

Q. These exhibits.

A. Those were from a whole set made out at the end of six months and one was delivered to each director to let him see the condition of the bank, that is to say, the amount that had been received in interest and cash, the amount of expenses, the interest paid, and the salaries, etc., covering the whole condition of the bank as I understood.

Q. And who had these at that time?

A. Each director had one.

Q. But I mean before the directors received them?

A. Mr. Mosher.

Q. And who was he?

A. He was the president of the bank.

Q. He was the one that delivered them to the directors?

A. Yes, sir.

FLANSBURG: Respondent offers in evidence exhibits 1, 2, 3, 4, and five.

Q. You heard the testimony of Mr. Hayden as to the transfer of these certificates of stock of yours; do you know who caused these certificates of stock to be transferred upon the books of the Capital National bank?

A. I do not.

Q. Did you ever cause them to be transferred?

A. I did not.

Q. When did you last see these certificates of stock?

A. When I transferred them to Mr. Gruetter.

Q. You heard the testimony of Mrs. King, did you not, in regard to a conversation with you after the Capital National bank had closed its doors?

A. I did.

Q. You may state what conversation was had with her, if any upon that morning, and how you happened to have that conversation?

41 A. Well, she came to my house on that Monday morning that the bank closed, and was very much excited, and I have no recollection of (say-) what she said I said, that is, the capital of the bank is impaired, because it was what I did not know then. I did say, however, that there was quite a block of the capital locked up in real estate, and that when that was sold and the money obtained put back, why I thought it would be all right. But the bank had closed then, and I said then, furthermore, that I thought the bank would pay out dollar for dollar I thought, or very near it. I had the impression at that time like a great many others——

• Lambertson objects as incompetent, irrelevant and immaterial, to the witness stating what he thought.

Witness continues:—like a great many others that the bank would pay out pretty nearly all of its indebtedness.

Q. Do you remember her further testimony, in regard to a reason you had assigned for selling your stock?

A. I don't remember that particularly.

Q. Did you ever give her any reason at that time for selling your stock?

A. I don't remember that I did.

Q. Did you hear Mr. Gerner's testimony?

A. I did.

Q. Do you remember what he testified in regard to a conversation with you, relative to a sale of your stock?

A. Yes, I remember he testified something with regard to what passed between us. I don't recall distinctly, there may have been something said between us about that, but as far as my being dissatisfied with the management of the bank, I frankly say that I was not in all respects—I remonstrated with Mr. Mosher myself, I told him that there was business enough there for him to attend to, and not to be engaged in so many outside issues, so many schemes, he was concerned in the stave factory, in the Western Manufacturing Company, in the Farmers', Merchants' & Insurance Company, in the Lincoln savings bank and in skating rinks and base-ball business, and all that, and everybody could see as well as myself—it seems to me that these people who were complaining so much about having lost their money, they could see as well as I that this was not the kind of a man to manage their money, that is to say, I think if there was any fault at all about it they ought to be able to see it as well as I.

Q. That was what you said to Mrs. King on that morning?

A. I think that is the substance of what I said.

42 Q. What you said to Mr. Gerner likewise?

Lambertson objects as leading

A. Yes, sir; he could see these things just as well as I.

Q. Did you tell Mr. Gerner in that conversation what amount of capital was tied up in real estate?

A. No; I did not know.

Q. I asked you if you told him?

A. No; I think not, because I would not be telling him anything I did not know, I do not think I ever knew, I do not think I know now exactly how much.

Q. You heard Mr. Hayden's testimony in regard to having sent you a notice of the Comptroller of the Treasurer of the United States, calling for an assessment upon sales of this capital stock?

A. Yes, sir.

Q. You saw the registry receipt he offered in evidence?

A. Yes, sir.

Q. Was that your signature upon there?

A. Well, it didn't look like my signature.

Q. Did you sign that name on that card?

A. Well, I should be inclined to say no, but then I would not be

absolutely clear, I didn't that I know of, but I don't know but that it is my signature.

Q. Did you at that time receive any notice from him?

A. No further than the paper from the Comptroller of the Currency, to my knowledge.

Q. Do you know whether you received that, or whether somebody else received it for you?

A. Well, I don't know; it is possible my wife may have signed that receipt, just possible.

Q. Have you examined the receipt carefully to see whether it is her signature or not?

A. No; I have not.

Q. You could tell by examining it, whether it was your signature or hers?

A. I don't know that I could.

Q. Does your wife sign so nearly like yourself, that you couldn't tell them apart?

A. No; she does not write like me.

Q. Do you think you could tell by examining that card whether it is your signature or your wife's?

A. Well, I couldn't tell positively, it don't look like my signature anyway, and whether it is I would not be able to swear. It is just possible that my hand is not as steady now as it was years ago, and my signature is not always just alike, although substantially it is.

43 Q. Do you know what became of the certificates of deposit and checks turned over by you to Gruetter & Joers in part payment of the purchase of this realty?

A. I think they put them into the First National bank.

Q. Answer yes or no.

A. No, I never saw the checks afterwards; after I delivered them to Mr. Gruetter I never saw the checks afterwards.

Q. Were they ever returned to you?

A. I never have seen them.

Q. What bank were they drawn upon?

A. Upon the Capital National bank.

Q. Were they all certificates of deposit? There were no checks drawn upon the Capital National bank, they were certificates of deposit?

A. $9,000.00 was in certificates of deposit, and then I gave a check that I think was returned to me.

Q. That was paid, that is what I am trying to get at.

A. I am not certain about that; I don't know whether I ever saw that or not, for it was about the time the bank failed, and I do not know whether that check came back to me.

LAMBERTSON:

Q. There was no checks on the First National bank?

A. No; certificates of deposit those were. Then there was an account in the Industrial bank; I forget how much now.

FLANSBURG:

Q. I don't care anything about that. They never tendered you these certificates of deposit and checks back?

A. Not to my knowledge. I know the certificates of deposit never came into my hands, and I would have to look in my stub book to see whether the checks came back.

Q. Now answer the question, did Gruetter & Joers ever offer these checks or certificates of deposit back to you?

A. Not to my knowledge.

Q. You would know if they offered them to you?

A. No, no, they didn't.

Q. You may state where the bank stock is, if you know, now?

A. I do not know.

(A.) Has that ever been offered to you since your delivery of it to Gruetter & Joers?

A. No, sir.

Q. You say those exhibits introduced by the complainant in this case in taking the testimony of Mr. Hayden, the receiver, showing a statement made to the Comptroller of the Treasury of the condition of the Capital National bank at various times, some of
44 which were signed by you, you may state the circumstances under which your signature was placed there.

A. Well, the way the thing was done generally, was this, they made out their statement, the officials of the bank, then they would seek those directors who were the handiest, I think generally, most accessible, and ask them to sign. When Mr. Holmes was alive, his office was right across the street, and he signed a great many because he was very accessible. I was a little further off, and of course not so far as some others, and perhaps I was the next, and that was the fact, as I think, that those most accessible were the ones they called on as directors to sign the statements. That is the way it was done with me.

Q. Did you examine the account or statement before signing it?

A. I just gave a casual glance over the figures. Of course I could not tell anything about it without knowing all about the books and everything, whether it was absolutely correct or not. I had to depend on fidelity of the parties managing the bank.

Q. The president and cashier?

A. Yes, sir.

Q. Could you have told from an examination of the books, whether these accounts were just and correct or not?

A. I do not think I could.

Q. Are you a practical book-keeper?

A. Well, not very much of a one perhaps; still I know enough to keep my own books.

Cross-examination.

By Mr. LAMBERTSON:

Q. Professor Stuart, what business are you engaged in now?

A. Well, I am looking after property in my charge and paying debts, collecting money and paying debts, taxes and so on.

Q. Loaning money also?
A. Don't loan much money in these days.
Q. But you have been engaged in loaning money, have you not?
A. I used to when taxes were not so heavy *are* as they — now, loan a little money.
Q. You loaned considerable from time to time?
A. Not so very much.
Q. Well, of your own and other people's money, you have loaned, have you not, several hundred thousand dollars?

Flansburg objects as not proper cross-examination.

45 A. Oh, no, not so much as that.
Q. You have held a considerable amount of property in your name which you have rented here, have you not, and collected the money from time to time?

Flansburg objects as improper cross-examination.

A. Oh I used to have it, I have charge of it now. I used to have it in my own name, and have charge of it now.
Q. Now, what business or profession were you in before this?
A. Before I came here?
Q. Before you came here, yes, sir?
A. I was in a university, connected with the university as professor and teacher.
Q. What university?
A. Well, several I have been connected with; the last one before I came here, was the University of Illinois.
Q. What was your particular work there?
A. Professor of chemistry.
Q. What other institutions have you been connected with?
A. Well, I was for a very short time, connected with the Pennsylvania Agricultural College, and I was also some four years connected with Harvard University, and previous to that Accadia College.
Q. What position did you hold in Harvard College?

Flansburg objects as improper cross-examination.

A. I was assistant teacher there.
Q. Of what?
A. Chemistry.
Q. Are you a graduate of some institution?

Flandburg objects as improper cross-examination.

A. A graduate of Brown University.
Q. When did you first buy any stock and become connected with the Capital National bank?
A. Well, about the time they moved up from the Commercial block to the corner here, that was about the time.
Q. Do you know what year that was?
A. I do not remember; it was somewhere near 1882, that is in my mind, I am not quite certain whether that is correct or not.

Q. You have really had some connection since it went under the name of the Capital National bank?

A. Well, until I disposed of my stock I was connected with it.

46 Q. Was you connected with the Marsh National bank?

A. No, sir.

Q. You have been a director, have you not, of the bank nearly ever since or since you have been a stockholder in it?

A. Pretty much all the time.

Q. Were you ever vice-president or president of the bank?

A. Never.

Q. You have also been chairman of the finance committee during a large period of your connection with the bank?

A. Well, I don't know as I could say chairman of the finance committee, I was a member of the committee.

Q. At the time you sold your stock, were you chairman of the finance committee?

A. I don't know whether I was or not.

Q. You were anyhow a member of it?

A. Yes, sir.

Q. What were the duties of a member of the finance committee?

A. The duties of the committee were to look over the bank's paper, and to see who had borrowed money, and to note whether they were in the judgment of the committee good, whether their names were financially good.

Q It was your duty largely, to pass upon the paper in the bank?

A. The quality of the paper, yes, sir.

Q. Were you also consulted, and was it part of your duty to advise as to loans that were (*to*) made by the bank?

A. No, sir, that business was left with the managing officers, the president and cashier chiefly. If we found any paper in the bank that we did not think good, we called the attention of the president and cashier to it. I remember distinctly now, the note of ex-Governor Thayer, which Mr. Hayden says he has still, and considers it worthless practically; that I objected to Mr. Mosher having that, told him he had better collect that as soon as it matured.

Q. How long before the failure of the bank was that put in?

A. Well, that was in, I couldn't say exactly, a year or two, a couple of years I should judge, because it was once renewed and the interest was added in, so that at first it was ($) $2,000.00, and then the new note was $2,160.00, or something about that.

Q. When you returned dividends did you count that as an asset, did you deduct that from the net earnings?

A. Well, I did not have anything to do with making out that part of it. I don't know whether they did or not.

Q. It is true, is it not, that in nearly every instance when dividends were returned you made the motion to declare the dividend?

47 A. Well, I do not remember whether I made the motion or not.

Q. You remember that you did make it sometimes, do you not?

A. Well, I do not know as I remember that. Some one would make the motion; I don't know whether I ever made one or not.

Q. So when dividends were returned you never examined the books to see whether any of this paper you thought bad you charged out or not?

A. No.

Q. Now, prior to the time the surplus was decreased, some time along in 1892, was there any bad paper ever charged off the books by the direction of the directors or the finance committee?

A. Not to my knowledge.

Q. So from 1883, the time you were connected with the bank, for ten years, or nearly ten years, up to December 16th or 17th, 1893, there was no bad paper ever charged out except at the time in 1892 when the surplus was decreased or the surplus was applied to the payment of some bad debts?

A. I do not know that there was ever any charged out. The bank examiner had that matter, as I supposed, in charge, and that $30,000.00 that was charged out was at his direction.

Q. At his direction?

A. As I understand. Yet I thought at the time that was a mistake. I was greatly surprised when I saw in the morning paper, when it was published, that statement that the surplus was only $4,000.00, and I thought there had been a mistake.

Q. $6,000.00 (wasn't) it?

A. No, it was $4,000.00; the surplus was $34,000.00.

Q. You need not explain about that now. The question I am putting to you is that the board of directors and finance committee never ordered any bad paper to be charged off the books of the bank or to be deducted from the earnings at any time, with your knowledge?

A. No; not to my knowledge.

Q Now, did you ever discover any other bad paper in the bank, other than this note of (Gove-nor) Thayer?

A. Well, there was some parties that we did not consider extra good. I used to take, in going over the paper, a pencil and a slip of paper and note down the parties that I thought perhaps a little objectionable, and those that were decidedly I would note the names down, and call the attention of Mr. Mosher or Outcalt to it, and he would generally have some explanation, which seemed to be
48 perfectly satisfactory, so that what seemed to be not exactly what it should be was passed as admissible.

Q. Now, do you not remember that the bank lost a considerable sum of money by the failure of Donald, Losson & Simpson, in New York?

A. Yes; I never knew much about that, and they kept that pretty closely to themselves. I knew there was a failure there, and that there was a loss, and they received some of that money back again, just how much I don't know, and just how much they lost I don't know.

Q. You did know there was a loss?

A. I know there was a failure there, and a loss.

Q. Did you not know there was a large loss there?

A. No, I did not know how large it was; I did not know it was a large loss.

Q. Did you ever inquire what amount the loss was?

A. I may have inquired, but they were rather reticent; did not always tell all the facts.

Q. Did not that arouse your suspicions, that they were reticent?

A. I supposed they knew what they were about, and would pull the thing through all right.

Q. You relied on them?

A. Yes, sir.

Q. Did you ever examine the account your bank had with Donald, Losson & Simpson, to ascertain the amount of the loss?

A. No; I never examined the books.

Q. You knew there was some loss, but didn't know how much?

A. I did not know how much.

Q. When you case the next year to return dividends, was there any deduction made on account of that loan?

A. That I could not say.

Q. You made your regular dividends just the same?

A. They made the dividend.

Q. The dividends were always made regularly without reference to any losses, and they varied very little during the history of the bank?

A. Well, they were pretty regular.

Q. What did they average?

A. Well, at first they paid, I think, about 12 per cent. annually; then they dropped to 10, and I think the last one I think was 8.

Q. Did not they sometimes go even above 12 per cent.?

A. It is just possible that for the first year (*of*) two they may have paid once or twice as high as 14; I would not state that to be a fact, but it is possible.

49 Q. Now, was not there a loss in the Sherman County bank by the failure of the Sherman County Banking Company?

A. I think I have heard them state something about that. Yes, I think there was a loss there, but I could not say how large.

Q. Did you ever inquire to find out?

A. I do not remember whether I did or not.

Q. Did not you know that loss was as much as from $14,000 to $20,000?

A. There was one loss, and I am not certain whether that was the bank that was in litigation. I am rather inclined to think that was the one; it was in litigation, and it was adjudged I think in favor of the bank; I don't know whether the bank has got the money or not, some $14,000.00.

Q. Is not the state of facts about this, according to your memory, that about 25 persons subscribed to the stock of the Sherman Banking Company, and gave their notes for the amount of the stock; the notes were negotiated by the Sherman County Banking Company; they indorsed them to the Capital National bank, and subsequently a stockholder by the name of Hogue was sued by the bank on that indorsement for the *the* reason, as was claimed in the petition, that

they had failed to comply with the corporation laws of the State, and judgment was obtained in the lower court, but *there* was not collected up to the time you sold your stock, and is now pending on appeal in the supreme court of the State. Is not that a fact?

Flansburg objects as improper cross-examination and immaterial.

A. Well, I should think that pretty near the state of facts, so far as I remember.

Q. So at the time that you sold your stock, so far as your knowledge went, that judgment had not been paid?

A. I did not know that they had.

Q. Is it not a fact that you said to Mr. Gruetter that the bank had that judgment, and you thought some day it would be collected?

A. I may have made some such statement to Mr. Gruetter; I don't know but that I did.

Q. Is that one of the items which you claimed why the surplus was used to wipe off the books, in your conversation with Mr. Gruetter?

A. Well, it was on account of bad paper at all events.

Q. There was one item of some $14,500.00 that was charged out, that you thought might be collected?

50 A. That was what I was given to understand by Mosher and Outcalt would be the result—that they would get that money.

Q. Now, when you returned any dividends, had you any knowledge that that amount was deducted from the net earnings or gross earnings or considered at all in making dividends?

A. No; I had no knowledge about that; do not know whether it was or not.

Q. Your best judgment and information was that it was not?

A. Well, I do not know.

Q. Now, was there not a large loss scored by the bank by the failure of a man by the name of Small and some bank in which he was connected at Edgar, Nebraska?

A. There was a loss there, but I was given to understand that they had real estate, so as to even it up very nearly.

Q. But the paper anyhow was overdue and was defaulted. Is not that true?

A. I do not know about that; I judge so, though.

Q. How much was the amount of that Small paper?

A. I could not say; I do not know.

Q. Was that *that* loss or defaulted payment of that paper equal to $40,000.00 or $50,000.00?

A. I could not say; I do not remember, I am sure.

Q. Did not you know that was a large amount?

A. Well, no; I did not know whether it was—well, I knew it was represented to me to be a loss, but nothing very definite as to its size.

Q. Now, when did that occur; how long before you sold out?

A. That occurred a good while before I sold out. That was—

well I judge that must have occurred not very long after they came up here to the corner.

Q. Do you know what year it was?

A. I do not.

Q. Wasn't it about the year 1887?

A. My impression was it was before that, but still it may not have been.

Q. Now, was that paid and settled up in 1892, when you went out of the bank?

A. That I could not say; I could not say whether it was or not.

Q. Is it not a fact that the land which you told Mr. Gruetter——

A. Whether the land has been sold yet or not, I am not able to say. I know there was quite a tract of land said to be there, as I was informed, which was to the credit of the bank.

51 Q. Is it not a fact, Mr. Stuart, that there was a big lawsuit which involved all that land during that period of time, and which has since the failure of the bank been decided in the Supreme Court?

A. Well, I could not say about that.

Q. Did not you know that it was involved in litigation?

A. Well, I do not think I knew that it was in litigation. I was given to understand that loss, the Small loss, was covered.

Q. Did you ever inquire as to whether it was in litigation?

A. No, I do not know that I ever did.

Q. Did not you know that it was in litigation?

A. No, I don't think I did.

Q. Now, don't you know, that attorney fees were paid from time (*time to*), Mr. Whedon, as the attorney of the bank in connection with that litigation?

A. With that litigation?

Q. Yes, sir.

A. No, I did not know that. I knew he was attorney for the bank, but I did not know he received any money as fees for services in that litigation.

Q. The bank had a good deal of litigation, didn't it?

A. Well, I don't know as any more than banks generally.

Q. Is that the land that you told Gruetter about as tieing up the capital of the bank?

A. That probably was a part of it, that was the York land, in York county, and the Small land where the two counties that the bank were interested in.

Q. Now, is it not true, that that York County land came to the bank not through or because of the indebtedness of Small, but came to the bank through the indebtedness of E. W. Mosger, the brother of the president of the bank?

A. Yes, sir, I never supposed the Small matter covered any land in York county; that land was in Clay county as I understand.

Q. Clay and Nuckolls county?

A. I did not know there was any in Nuckolls county; I thought it was in the neighborhood of Edgar, in Clay county.

Q. How much land did the bank own down there?

A. I could not say.
Q. Did it own several thousand acres?
A. I could not say how much it owned.
Q. Did it own more than one quarter section?
A. I could not say that, I judged more than one quarter section; in York county there was a long list of paper as long as that, I have seen with an enumeration and some larger and some smaller sections.
Q. A piece of paper three feet long?
52 A. Yes, sir; I think so.
Q. Was not that list of land in Custer county?
A. I don't know anything about Custer county.
Q. Now, to go back to this Small failure, did you not know that covered a large amount of money, Mr. Stuart?
A. I never knew how much.
Q. Do you not know approximately how much?
A. No; I don't know even approximately.
Q. Wasn't it as much as $25,000.00?
A. That I could not say.
Q. Now as a director of that bank, did you think it was right and your duty and good banking to return dividends when so large an amount of your money, and capital and the funds of depositors were tied up in real estate and litigation?

Flansburg objects as assuming facts of which there is no proof, no foundation laid, incompetent and improper cross-examination, and because the witness has already shown that he had no knowledge of this condition of affairs on which this hypothetical question is based.
Lambertson objects to counsel instructing the witness.

A. Well, in the first place I did not know how much there was—how large a part of the capital was tied up there. I had confidence in the managers of the bank, and I supposed they would not declare a dividend unless there was proceeds enough to justify declaring the dividends.
Q. Who declares a dividend anyway?
A. It was always made out by the managers of the institution and the directors of course to declare it.
Q. Dividends are declared by the directors, and not by the officers?
A. Yes; made out through by the *the* officers.
Q. The figures and data may have been presented to you. Now, in looking over the bills receivable, did you ever find a large amount of paper there, signed by E. W. Mosher, the brother of the president of the bank?
A. Yes, sir; I found some paper signed by him.
Q. How much did it amount to?
A. Well, the different notes ran up to $45,000.00 or $50,000.00, somewhere in that neighborhood.
Q. Was that paper in the bank at the time you sold your stock?
A. This paper was indorsed by C. W. Mosher, and I considered that C. W. Mosher's name was just as good——

(Question repeated.) Was that paper in the bank at the time you sold your stock?

53 A. I think it was, so far as I remember.

Q. And was this Small paper in the bank at that time?

A. I do not know, I do not think I ever saw the Small paper. They had a faculty of keeping bad paper out of our sight in some way or other.

Q. When did you learn that fact?

A. Since the bank failed.

Q. Did you not suspect that they were doing it at that time?

A. No, sir; I did not.

Q. Did you ever take the bills receivable and run them over and add them up?

A. No, sir.

Q. If you had done that, you would have discovered that this paper was kept from your sight, would you not?

A. Never had a list made out, no; we simply went over them note by note.

Q. Did you ever have a list of the bills receivable made out?

A. I do not know whether I should or not, I am sure.

Q. Just went over what you found?

A. Yes, what were given us, but I have learned since—well, now, Outcalt I had I think in there for I don't remember how much, but I never saw that note. Mosher had a large note in there borrowed of the bank's money, but I never saw it, and I never saw any of this Donald & Losson paper.

Q. But you suspected there was something wrong there, because they were kind of sneaking about it?

A. Well, they said, they occasionally spoke of this Donald & Losson affair, and I knew there was something there, but how much it involved, I did not know.

Q. Now in making dividends, none of these loans were ever scored off the books?

A. I don't know whether they were or not.

Q. I want to call your attention to this Exhibit "I" that you put in evidence, when is the date that was handed you?

A. I do not remember; if we had the interest-received book here, which I think we ought to have, we could find this amount and fill the date, I do not see any date at all on it.

Q. Now, I notice here, the interest received is $42,082.82 and the interest paid is $10,749.88; did you ever verify that item of interest received?

A. Verify it in what way?

Q. By examining the interest received book?

A. Not in that particular case perhaps, but then as I have said I used to look at that interest-received account as many as two or three times a week, and used to note its gradual increase

54 along, and it would foot up at the end of six months usually in the neighborhood of $35,000.00 or $40,000.00. Now then it shows there $42,000.00 I think.

Q. It shows interest paid $10,749.88; did you ever look at that account?

A. No, sir; I don't think I ever saw that book in the bank.

Q. Did you ask for it?

A. I don't know that I ever asked for it.

Q. As a director that intended to return dividends, was not it just as important to examine the interest-paid account as it was the interest-received account?

A. The interest received, was of course what the dividends were paid out of, but I did not look at the duties of a director as laying upon him such a burden as to spend all his time in examining the various books of the bank, and as it has turned out, after having been manipulated so much, it would not have done any good because we could not have told anything about the condition of the bank.

Q. You do not know when the manipulations were made, they might have been made afterwards, if you had examined them at a time before the manipulation were made, you might have discovered this. Now, I will call your attention to the minutes of the directors' meetings, on page 55, and ask you to look at the book and examine it in connection with Exhibit "I" and state whether or not Exhibit "I" was handed to you on or about the 20th day of January, 1889?

A. That I should think was the same; at all events there is a correspondence there; I should judge this was the same record, a copy of which was delivered to each director.

Q. Calling your attention to a slip of paper pasted in the book there, below the minutes on page 55, and which purports to be signed by W. W. Holmes and A. P. S. Stuart, and ask you if that is your signature there?

A. It looks like it "as per instruction of the board of directors;" what word is that there?

Q. "We have."

A. "Paper of Capital National bank and"——

Q. "And found same satisfactory?"

A. "And found same satisfactory." That of course was the paper of the bank that came under our eyes.

Q. So at that time you did examine the paper of the bank and as per instructions of the board of directors, and report that you have found same satisfactory?

A. Yes, but they did not include any Small papers so far as I recollect or other bad paper.

Q. Did you find any Western Manufacturing Company paper at that time?

A. Oh a little, not much.

55 Q. How much?

A. I don't remember.

Q. Did you consider that good?

A. Well, I did not know anything about the Western Manufacturing Company. There was a time that I considered the Western Manufacturing Company good, and it is a wonder to me that I did

not have some stock in it almost, but it happened so that I did not happen to get into that thing; there was a time that I thought they were making money.

Q. And there was a time that you thought they were not?

A. Afterwards they were not of course, that is as I understand.

Q. But this paper continued in the bank right along?

A. What paper?

Q. The Western Manufacturing Company paper, signed by E. Hurlburt, Jr., manager.

A. Never was very much to my knowledge of that paper in the bank. There was some of it in the bank, not a very large amount it seems to me, I don't remember.

Q. How long before the failure of the bank was it you made your last examination of the paper?

A. I don't remember now, two or three months perhaps, I don't remember exactly the time.

Q. At that time, did you find a lot of Western Manufacturing Company paper in there?

A. Now I don't remember, I don't remember whether we did or not, I could not say.

Q. If you did find it there, did you make any objections to it?

A. Well, I don't remember about that. I don't remember as we made any objections, I don't remember as there was any there then.

Q. Do you remember ever making any objections to that Western Manufacturing Company paper?

A. There was a time when I thought anything connected with that Western Manufacturing Company was good.

Q. But there was a time when you thought it was not good?

A. Afterwards, after I learned, and since the bank——

Q. I mean before the bank failed.

A. I did not know anything about it then. I did not know then, this has all come out since.

Q. Was not there in the bank, at the time you went out of it over $100,000.00 worth of that paper in the bank?

A. I do not know, I could not say

Q. Was not there some of it?

A. I could not say, I do not remember.

Q. Would not you remember a line of paper of that kind?

56 A. I do not remember I am sure now, but I remember there has been in the bank some of that Western Manufacturing Company paper come under my eyes, but as I say there was a time when I understood that paper good.

Q. But there was a time before the failure of the bank when you considered it bad?

A. No; I don't remember; it has come out since.

Q. Did not you make some objections to that paper while (*ypu*) were a director?

A. I do not remember, I do not know that I did.

Q. Did not you at the time of the failure of the bank, at the time you sold out your stock, know that there was some of that paper in the bank?

A. No; I could not say that.

Q. Well, if there was $125,000.00 of that paper in the bank, and more than $110,000.00 that was rediscounted, why wouldn't you have known that fact?

A. I did not know there was so much rediscounted, but I learned afterwards there was a large amount of the paper, every good piece of paper as I understand was disposed of, rediscounted, and the money as I think was put right down in Mosher's pocket or Outcalt's; that was what they did all—the last part of the bank's existence, the last three months of it was spent in borrowing money, in sums of $5,000.00 to $20,000.00 and putting it down in their pockets and discounting the best paper in the bank, and taking that money and putting it in their pockets. That is my honest opinion about it.

Q. Now, I call your attention to Exhibit "2" that you have put in evidence under date of July 5th, 1890, and I find here the interest received $34,751.76, and the interest paid was $7,452.81, now did you examine the interest-paid account at the time this statement was presented?

A. I never examined the books of the interest-paid account. I do not think I ever saw the book until the bank failed. The interest-received book, that was lying right in sight, and that was the reason I looked at that.

Q. You examined that which brought the bank in an income but the outgo you never examined?

A. That is stated you know in the summing up.

Q. All you were after where the dividends and not the expenditures, was not that the fact?

A. Why, I told you I supposed they were managing the business all right, and I had the utmost confidence in them and in
57 their doings, and consequently I did not trouble myself to go to an examination of the books; I think that was the fact with reference to every man that was connected as a director of the bank.

Q. Now in July 9th, 1889, I notice the gross interest receipts are $39,000.00; interest-paid account $8,940.94; did you ever examine the interest-paid account then?

A. No, sir.

Q. You never examined the books at all at any time?

A. No, not of that kind at all.

Q. The only book you ever looked into, as a matter of fact, was to see how much interest the bank was getting?

A. I used to look occasionally at my balance, the ledger.

Q. The only two things you were looking at, was your balance and the amount of interest received by the bank, those two things you kept your eye on?

A. Not particularly; I could not have kept my eye on them any more than the rest, provided the book had been right in sight, that is the only reason.

Q. Did you know about the Marsh paper that was in the bank?

A. No that is a matter of which I have heard something about, that there was a large quantity of Marsh paper, but I don't know

that I ever saw that in the bank here. I have heard it was put in there by Mosher as his capital, paid for—his stock with that paper, but I do not know whether there is any truth in that or not.

Q. Do you know that paper was carried in the bank from the time the Capital National bank was organized up to the date you sold out your stock?

A. I have heard it somewhere, but I do not think I saw it.

Q. Will you swear you did not see it?

A. I do not have any remembrance of seeing it, do not think it was kept with the bills receivable generally, they must have kept it in some other place.

Q. Do you mean to say, Professor, in swearing here that you never saw any of that paper at any time during the time you were a director, and on the finance committee, among the bills receivable?

A. I do not recollect it now. That is a kind of paper they would not care for me to see, the Marsh paper was old paper that was valueless, substantially, I suppose.

Q. You were generally present, were you not, at all meetings of the board of directors when dividends were returned?

A. Well mostly.

58 Q. What is the aggregate amount of dividends you have received since you were a stockholder?

Flansburg objects as incompetent, immaterial, and improper cross-examination.

A. Well, I have never figured them up.

Q. You have been sued for them (hav-n't) you?

A. Yes, I believe so, I think they have sued me for something about $12,000.00 or $13,000.00 of dividends.

Q. You probably received that amount, did you not?

A. Well, I do not know; I say I never figured it up.

Q. Did you have at any time any idea of the aggregate amount of the bills receivable?

A. Why no, I do not know as I ever did have a definite idea of the aggregate amount of the bills receivable, I know that Mosher told me once that they had $8,000.00 on deposit.

Q. How long was that before the failure of the bank?

A. That was some time before the failure of the bank, I do not remember just how long, must have been two or three years perhaps. That was loaned out, and it was the interest on that — figured up to $40,000.00. Now, they pretend to say that the bank never (make) any money, but I do not believe that. The bank could not help making money when it had that amount of deposits on hand, and loaned out and had 10 per cent. on it.

Q. They were paying interest on them?

A. Not on the deposits they were not.

Q. Not paying interest on deposits, what did you pay it on?

A. When I put money in there, I never—well, yes I did receive once in a while a little interest, but banks running an account do not generally pay interest on deposits.

Q. You had a large number of certificates in there, did you not?

A. I had, to be sure, but is that another thing.
Q. They are deposits, are they not?
A. Yes sir, they are deposits.
Q. Did not you pay interest on bank deposits?
A. Well, not on all the bank deposits. When large sums were put in there, probably they paid interest.
Q. Did you pay interest on daily balances to banks?
A. No, I do not think that they —. I know I sometimes had as much as, well, quite a number of thousand of dollars on deposit there, and I never received any interest on them, and I suppose that business men generally when they put their money in there, say, all the way from $2,000.00 to $3,000.00, they did not pay any interest on it.

Q. Did you ever examine to see whether they did or not?
59 A. No; I know in my own case; I know what the fact was that I didn't get any.

Q. Is that the reason you took it away and put it — some other banks?
A. Well, I didn't take it away and put it in some other bank. I kept my business there until the bank failed, and I had $2,500.00 when the bank failed.
Q. Was that in your name?
A. Half of it was in my name.
Q. Whose was the other half in?
A. My wife's.
Q. Was that your money?
(Q.) What money?
Q. That $2,500.00.
A. Half of it was mine and half of it was hers, or thereabouts.
Q. That was your money, and not somebody else's?
A. Why, no; it was my money, of course, and I lost it, too.
Q. Now, did you have some money in the First National bank?
A. At that time?
Q. At the time you sold your stock.
A. No; I did not do any business at all there.
Q. Did you have any certificates of deposit there?
A. I used to do business there.
Q. I mean at that time?
A. No.
Q. Did you have any business in the Industrial savings bank?
A. I had some.
Q. Did you have anything on deposit there?
A. Yes; I did; some.
Q. All of these certificates of deposit you turned over to Mr. Gruetter were issued by the Capital National bank?
A. Not all of them; there was $9,000.00 issued by the Capital National bank. The Industrial savings bank, I forget just how much was drawn from there; several thousand dollars, and then the account of the Lincoln savings bank, I took that.
Q. How much did you have in there?
A. Oh, something over one thousand dollars.

Q. You drew $9,000.09 out of the Capital National bank?

A. Yes; between $10,000.00 and $12,000.00. I gave a check on the Capital National bank for $1,000.00 and then I drew out $9,000.00 certificates of deposit, and then I gave a check for the balance, some $300.00 odd.

60 Q. Now, Mr. Stuart, can you tell the court the time the last dividend, for instance, was made, what was the aggregate good bills receivable in that bank?

A. Well, I could not tell you, because I did not sum them up.

Q. Never did sum them up?

A. Never did; no.

Q. You signed statements showing the amount of bills (receivable), made to the comptroller from time to time, did you not?

A. No; not to my knowledge, did I. You have reference to the statements made by the bank.

Q. Yes, which you have signed as director.

A. Yes; if you take that, of course. I signed some of those statements, but I did not sum up the bills receivable; that was done by others in whom I had confidence, and supposed they did it all right.

Q. Calling your attention to what purports to be a report of the condition of the Capital National bank made to the comptroller of the condition of the bank at the close of business on the 30th day of September, 1892, I will ask you if that is your signature attached there?

A. Yes; I will admit that, of course. I signed that the same as directors do other statements, without knowing any- positive, depending upon the fidelity of those making the statement.

(*A.*) I notice that you here certify that this statement is correct; was it correct, Mr. Stuart?

A. Well, since things have developed as they have, I cannot say that, perhaps it was; I supposed it was correct then.

Q. Did you verify it at all?

A. Why no; I did not verify it.

Q. Did you verify a single item of it?

A. No; not a single item.

Q. You simply signed it because the president or cashier told you to sign it?

A. Because they requested it.

Q. I notice the bills receivable were $759,762.79; do you know whether that is correct or not?

A. No; I do not.

Q. You never added the bills receivable up at all, did you?

A. No; I have said that again and again.

Q. That is only two months and a half before you sold your stock?

A. Well, I had confidence in the whole business then as I had before.

Q. Now, then, did you know at the time that there was the Small matter, amounting to $56,756.53?

61 A. No; I did not; I did not read it all over.

Q. I call your attention here to E. W. Mosher, $48,950.28?
A. Yes, as obtained on that paper.
Q. Did you consider those loans good?
A. The Mosher paper was indorsed by C. W. Mosher, and I considered that good.
Q. Did you usually take paper there wholly on the faith of the indorser?
A. If I thought the indorser was good.
Q. Now, what business was E. W. Mosher engaged in anyway?
A. He was with a man by the name of Stark out there in the loan business, and that money was sent out there by the Capital National bank, to be loaned out on real-estate mortgage-, 10 per cent. I think was the way.
Q. Did you not know no national bank had a right to loan money on real estate?
A. That of course—I think that was the way they did that, at all events that personal security is what was required I think.
Q. Did not you know that all those loans turned out substantially bad?
A. No; I did not know that.
Q. Did not you know that at that time?
A. What time?
Q. The time you sold your stock.
A. No, sir.
Q. Did not you know that at the time you signed this statement?
A. No; I knew there had come a lot of real estate in the hands of the bank and I thought that real estate in your county was good and would liquidate the indebtedness.
Q. Now, in all these statements you signed, you certified there was no bad debts, did you not?
A. Well, if you look at it in that light. I do not know whether that statement implies all that or not. I don't know whether there are any bad debts there or not.
Q. Calling your attention to this line here says, "bad debts nothing"?
A. Yes, sir.

FLANSBURG: You can state if you ever saw that before or make any explanations you want to.

A. I never examined that; I do not know that I ever examined any of these statements directly to go over all of them. There is an immense amount of work in it, and I did not sit down to go over all that and I would not know whether it was correct or not
62 after I had gone through the task. Why, I supposed, as a matter of fact, I certified those statements and signed them just as directors signed those statements in other banks now. I don't suppose there is a bank in this city where the director knows everything is absolutely correct.

LAMBERTSON:

Q. You did know there had been losses in Donald, Losson &

Simpson and in the Sherman County bank, and through Small, and and probably had been losses through Mosher in York county, and yet in all these statements you have signed you made no reference to those at all, is not that true?

A. Well, I did not know what the condition of those—whether those losses had been partially paid and were in the process of being paid. I understand that Donald, Losson & Simpson was in litigation and they would probably get back considerable of their money there, and then that Sherman County bank, I also understood that was in litigation, and that had been already decided in favor of the bank so that the loss there would not amount to much; and the Small matter, there was land there, and I supposed that land would cover the deficit, I knew that land was good down there.

(*A.*) Notwithstanding all these matters you thought the bank was in good condition, did you not?

A. I did; yes, sir.

Q. Did you when you sold this stock to Mr. Gruetter, did you tell him about this Donald & Losson failure years ago?

A. I don't know whether I mentioned that or not.

Q. Did you tell him about this Sherman County loss?

A. I don't know that I mentioned that.

Q. Did you tell him about this loss of Small?

A. Well, I don't think I mentioned any of those that I know of.

Q. Did you tell him about any of these loans and investments with E. W. Mosher in your county?

A. No, because I did not know but that they would all be paid, substantially so.

Q. Did you tell him about the Western Manufacturing Company?

A. I don't think there was anything said about that to my knowledge.

Q. Did you tell him about the Marsh paper?

A. I never saw that in the bank.

Q. Did you tell him about this John M. Thayer business?

A. I forget whether I mentioned that to him or not.

Q. You have no memory of mentioning any of these to him, have you?

A. I don't think I mentioned any of them, and I don't know; I did not know but they would all be settled and the bank sustain the losses and still be good.

63 Q. You remember you did tell him the bank had paid large dividends, did you not, you remember that?

A. No, I don't remember that; I don't know but that I did.

Q. Did you tell him you could buy this stock back again shortly if you could make a turn?

Flansburg objects as incompetent, immaterial and improper cross-examination.

A. I don't remember whether I did or not, and I don't know but I did.

Q. Now, can you remember any other bad paper in the bank to

which you called Mr. Mosher's attention besides this note of John M. Thayer?

A. Oh, I could not tell now, because I used to make a minute of it on a slip of paper, and when I got through with it threw it away.

Q. How many entries did you make?

A. I would make in going over the paper, I would make a dozen or twenty, perhaps; sometimes in small amounts, usually in small amounts they would be.

Adjourned until two o'clock p. m.

LINCOLN, NEBRASKA, *February 20th*, 1895—2 o'clock p. m.

Pursuant to adjournment, the further taking of testimony under the agreement herein is resumed as follows:

Continuation of the cross-examination of Mr. STUART.

By Mr. LAMBERTSON:

Q. I hand you what purports to be the certificate of deposit register of the Capital National bank, and ask you if you ever saw that book before, and whether you ever examined it or not?

Flansburg objects as improper cross-examination.

A. This is the same book as in Mr. Hayden's office?

Q. Yes, sir.

A. I saw it there.

Q. Did you ever see it in the bank prior to the failure of the bank?

A. No, sir.

Q. Did you ever examine any of the certificate of deposit registers of the bank?

A. No, sir.

Q. Did you ever take the drafts that were returned into the bank and paid and compare them with the certificate of deposit register?

A. Never.

64 Q. Never examined to see whether there was any manipulation of those books at all?

A. No; I did not think there was any occasion for it; I had the utmost confidence in the parties managing the bank.

Q. Did you know in a general way the amount of the deposits of the State of Nebraska, of the State treasurer of Nebraska, J. E. Hill?

A. Only in a general way as I heard them reported occasionally.

Q. About how much money did the State treasurer have on deposit in the bank at the date that you sold out?

Flansburg objects as improper cross-examination, and no foundation laid.

A. Well, I could not answer that question from having looked at the books; from the reports that I heard I judge that it was somewhere in the neighborhood of near $300,000.

Q. At the time you sold out?

A. Well, that I did not know at the time; that has come out since, you understand.

Q. You knew the State of Nebraska was a large depositor with the bank?

A. Well, I knew there were pretty large sums occasionally there from the State treasurer, but just how much I did not know, but since——

Q. I am not asking you since; I am asking you about what you knew before the failure of the bank.

A. I did not know then when I sold out.

Q. You simply knew they were a large depositor?

A. I knew they often were large depositors, but how much there was then I did not know.

Q. Did you ever examine the account of the State treasurer to see how much it was?

A. No, sir.

Q. Did you know whether those deposits were on certificates or on an open account?

A. I did not know which it was.

Q. Did you know whether they paid interest on those accounts or not?

A. Only by hearsay.

Q. What do you mean by hearsay?

A. Only by report that they did pay some interest.

Q. You got that from Mr. Mosher or the cashier of the bank?

A. I don't know whether it was Mr. Mosher or some other parties.

65 Q. You know from your dealings and connection with the bank in your duties that (interests) was paid on those deposits by the bank?

Flansburg objects as incompetent, no foundation laid.

A. I simply know by hearsay.

Q. What do you mean by hearsay?

A. From what I heard people speak.

Q. People connected with the bank?

A. They may have been connected with the bank or not.

Q. As director you knew they were paying interest on deposits, didn't you?

A. Not positively.

Q. You knew they were paying on county, city and State deposits, didn't you?

A. I only know in the way I have said; I did not examine the books to see.

Q. That was your understanding of it, wasn't it?

Flansburg objects as calling for an opinion based on hearsay.

A. Well, that was my impression rather that they did pay some interest.

Q. Did not you know the State deposit amounted to two or three hundred thousand dollars?

A. No, I did not know that then.

Q. Did not you know the Capital National bank held more of the State funds than any other bank in the city?

A. No, I did not know that.

Q. Was not that a matter generally talked about, and that you had the best standing with the State treasurer for those deposits than any other bank in the city of Lincoln?

Flansburg objects as incompetent, irrelevant, immaterial.

A. Why no, I did not know that.

Q. You believed it, didn't you?

A. No, I did not believe it; we did not know it.

Q. What rate of interest did your bank pay on certificate of deposits?

A. Well, sometimes they paid one rate and sometimes another; sometime- five and sometimes they paid four I think and I guess in some cases they paid as high as six.

Q. Now, what did you get on these certificates of deposit you had in there that you turned over to Gruetter?

66 A. I think I got on one of them six per cent. and the others I believe were five, that is my recollection now.

Q. What was the current rate at which money was loaned?

A. To parties that came to borrow?

Q. Yes, sir.

A. I think it was 10 per cent.

Q. Is it not true that there was considerable paper in the bank that was loaned out at eight per cent.?

A. There may have been, but I think the usual rate was ten, I do not know but (lat-er*ally*), along at the last, there may have been some more loaned out at eight than previously, but along at the first of the bank's existence on the corner here I don't think there were any loans made for less than ten; I do not know that there were.

Q. Did you receive the notice of the assessment sent by Mr. Hayden as receiver, on the capital stock of the bank, including the stock that you had sold to Mr. Gruetter?

Flansburg objects as improper cross-examination.

A. I found it in a drawer which I had overlooked and I thought at first I had not received any but I found the paper in a drawer, overhauling some of my papers, and I forgot entirely I had received it.

FLANSBURG:

Q. State when you found that.

A. I found it yesterday.

LAMBERTSON:

Q. You remember having received that, don't you?

A. No, I do not remember anything about having received it; it was an utter surprise to me to find an envelope in a drawer marked registered letter.

Q. That was addressed to you, was it?

A. Yes, sir.
Q. Was it opened?
A. Yes, sir.
Q. It was in your papers?
A. Yes, it was among my papers.
Q. What was the date of the postmark?
A. I think it was in July.
Q. About 1893?
A. I think so.
Q. Well, if you had received that notice of that assessment, would you have paid it?

Flansburg objects as improper cross-examination, incompetent.

67 A. Why, I do not think I would, because the substance of the notice was that the stockholders were the ones to be assessed, and I, not being a stockholder, did not consider it belonged to me at all.
Q. So you would not have paid it?
A. Why, no, that is the very question in point now, as I understand it.
Q. Yes, I did not know but what you were putting it on the ground you had never been asked for it?
A. I should have put it on that ground if I had not run against that paper which I had forgotten entirely about, but I don't know how it escaped my mind it got there.
Q. Did your wife get that paper?
A. I do not know; she may have signed, possibly, the receipt.
Q. Did you not tell her to sign it?
A. No; I did not tell her to; I only accidentally happened on to it.
Q. Would she have had authority to sign something like that?

Flansburg objects as incompetent, immaterial, not proper cross-examination.

A. Well, she does sign sometimes in case of express packages, and, well, this would be a case of a letter, I do not know whether they ever allow registered letters to go out of the office—I have an impression that the carrier may have brought it around, and that she may have signed it.
Q. She signs receipts sometimes for moneys paid to you?

Flansburg objects as incompetent, irrelevant, immaterial, not proper cross-examination.

A Yes, sir.
Q. She would be authorized to sign a registry receipt if they would accept it, would not she?

Flansburg objects as incompetent, immaterial, improper cross-examination.

A. If what?

Q. If the post-office authorities would accept her writing your signature you would have no objections to it?

A. I think not.

Q. Did Mr. Hayden ever talk to you about paying this amount before suit was brought?

A. No; I think not; I do not have any recollection now of his having done it.

Q. Did not he ask you to pay this, and you told him you would not do it?

A. It is possible I told him so if he asked me if I would pay it, but I do not recollect now.

68 Q. I will ask you this: Did it occur to you, Mr. Stuart, that six per cent. was a very large rate of interest and a very high rate of interest for banks to pay on certificates of deposit and for moneys that were deposited in that bank?

A. Yes; I thought it was a pretty high rate, that is very true.

Q. Did that matter excite your suspicions?

A. No; it did not excite my suspicions at all.

Q. Did not it make you wonder at times how the bank could pay six per cent. on deposits and yet pay such high dividends?

A. They did not pay such high dividends at last, that was only eight per cent.

Q. That was the last dividend?

A. That was the last year.

Q. But before that they had always paid 10 or 12?

A. They had paid ten sometimes.

Q. For nine years, out of nine and a half years they had paid dividends when you were a stockholder, they had paid ten to twelve per cent.?

A. Most of the time it was ten per cent. I think.

Q. The question is, did not it excite your suspicion, the fact that they were paying such large dividends and at the same time paying such a high rate of interest on deposits?

A. Well, that was only on certificates of deposit; there was a large line of deposits on which they did not pay any interest.

Q. Did you know how much money at the date you sold out, or at (th-) time of the last statement, what amounts of certificates of deposit were outstanding?

A. No, I do not know, and did not then.

Q. Did you ever inquire?

A. No.

Q. Did not you know pretty near $500,000 was on deposit in interest-bearing certificates?

A. No, I did not know that.

Q. Did you know Mr. Mosher was issuing certificates of deposit for $100,000 and entering in the certificate of deposit register for $100?

A. No, sir.

Q. Did you ever examine the old certificates that were paid and returned and on file in the bank and compare them with the certificate of deposit register?

A. No, sir; if I had I would have caught on to the movement.

Q. Did you ever know that even one of these certificates for $2,000 that you have turned over to Mr. Gruetter was entered in the certificate of deposit register for $20?

69 A. I did not until the examination of Mr. Hayden down here.

Q. You did not examine the certificate of deposit register at all?

A. No.

Q. If you had, and compared it with the number of the certificates you then held, you would have discovered it, would not you?

A. Then I should have had a point, then.

Q. But you remained in blissful, blind and profound ignorance of these facts?

A. I had to sum it all up in a word, the utmost confidence in Mosher and Outcalt.

Q. You did not at the time you sold out?

A. Why, yes, I did.

Q. I understood you to say that you did not like the way which they were managing the bank?

A. O, of course, there were some things about Mosher's schemes I did not fancy, but that did not excite my suspicion at all, of his crookedness. I thought he was straight as a string in his business transactions.

Q. You knew he was in the skating-rink business?

A. I knew he had been in it.

Q. You knew he was in the base-ball business?

A. Yes, sir.

Q. You knew he had been in the horse business?

A. Yes, he was a little inclined to that.

Q. You knew Outcalt had a stock horse farm down here?

(*Q.*) Yes, he was in that.

Q. You knew they were in the base-ball business?

A. I don't think Outcalt was.

Q. Mosher was.

A. Yes, sir.

Q. And in the stave and lumber business?

A. Yes, sir.

Q. And the penitentiary contract?

A. Yes, that was what I objected to and told him so.

Q. That was what scared you a little?

A. No; it did not scare me particularly, because——

Q. It was one reason you wanted to get out of the bank?

A. It was one feature that was not very agreeable to me.

Q. That was the real reason you did not like the way he was managing affairs?

A. No; I did not have any particular desire when I sold to get out of the bank, and left what money I had in the bank.

Q. As a matter of fact, one reason you wanted to make this trade was so as to have an excuse to draw out what money you had in the bank?

70 A. No; I do not think that it was.

Q. You would not swear that it was?

FLANSBURG: Of course he swears it was.

Lambertson objects to the statements made by counsel.

FLANSBURG: I want these statements taken down.

So do I.

A. No.

Q. You drew out $10,000 out of the bank, did not you, and turned it over to Mr. Gruetter?

A. Yes, sir.

Q. And was not you a little afraid that you might lose some of that money if you did not draw it out?

A. I do not think the thought occurred to me.

Q. How much money did you draw out of the bank between the date you turned over to him $19,500, to Gruetter, and the time of the failure of the bank?

A. How much money did I draw out of the Capital National bank?

Q. Yes, sir.

A. O, there was a little over $10,000. I might say that I might raise the same objections to my taking money out of the Lincoln savings bank, and of the (*the*) Industrial bank, that I was afraid they would go to pieces, because I took money out of all the banks.

Q. When did you commence putting money in the Industrial savings bank?

A. I think I have had it in ever since it started, more or less.

Q. When did you put money in the Lincoln savings bank?

A. When that started.

Q. Now, you knew, did you not, at the date you made this sale to Gruetter, you knew they would not return a dividend for that six months?

A. Well, I was not positive of it, but I had an intimation they would probably pass the general dividend, and I told Mr. Gruetter so, I think.

Q. Did not you tell Mr. Gruetter, did not you and he haggle about it, and talk about who should have that dividend if it was not passed?

A. I do not remember what was said about that, I am sure.

Q. Did you know of Mosher having any other resources for the money and to obtain the money which he put into these various schemes and enterprises and business in which he was engaged other than the bank?

71 A. No; well, I do not know whether I have heard that his father-in-law was wealthy, and sometimes I have heard that he got some money there, and then I do not know whether I put much confidence in that or not.

Q. Did you know of his ever getting any money there yourself?

A. No; I never knew of it myself.

Q. The presumption or supposition, then, was that the money he put in these various enterprises he got from the Capital National bank?

Flansburg objects as incompetent, improper cross-examination and calling for the presumption of the witness.

A. Well, that might be the presumption perhaps, but I was told by Outcalt that there was not another young man in this town that was making money anything like as fast as Mosher was, and when I looked into Dun's Register I saw that he was creeping right along up, his rate was high, and keep getting higher. Well, of course, I did not understand; I thought the fellow was one of these regular money-catchers—some way or other he made money; I did not know exactly how, and of course if he made money he had to put it into these various enterprises.

Q. Wasn't the grounds of your uneasiness and your dislike of his business methods due to the fact that he was engaged in all these enterprises, and you were afraid the bank would be drawn upon to carry on and support these various enterprises?

A. No; you say uneasy; I was not uneasy. I had the utmost confidence, I have said again and again, in the management of the bank, in Mosher, and I thought that when Mosher's name was put on the back of a note that that was gilt edge, it could not be any better.

Q. Why did you then object to his going into these enterprises?

A. O, well, on general principles I did that.

Q. Your business judgment told you he had entirely too many irons in the fire?

A. That was what any man's business judgment would tell him; still at the same time I thought he was making money in these various enterprises, some of them at least. I did not know whether he made anything out of the skating rink and base ball, I am sure.

Q. He was quite prominent in politics?

A. Yes; he was a politician, too.

Q. He had the penitentiary contract?

A. He has got it yet.

Q. And he was interested in base ball?

72 A. Yes, sir.

Q. And he was in the Western Manufacturing Company?

A. Yes, sir.

Q. And the Southern Stave & Lumber Co.?

A. Yes, sir; and the Farmers' & Merchants' Insurance Company.

Q. And the gas company?

A. Yes, sir.

Q. And the Lincoln savings bank?

A. Yes, sir.

Q. And the legislature?

A. Well, no; he was not in that.

Q. He was interested in it; he was a lobbyist?

A. Yes; a lobbyist.

Q. And you did not like these things?

A. Well, scarcely any business man would.

Q. I am asking what you thought?

FLANSBURG: You can answer it in your own way.

A. Why, I told him myself I thought——
Q. He had better get out of those things?
A. Yes, sir.
Q. You told Gerner that was one reason you wanted to sell out?
A. No; I did not tell Gerner that exactly.
Q. What did you tell Gerner?
A. I do not remember.
Q. Did you tell Gerner you did not like such methods of doing business, and you wanted to run your own business?
A. I may have told him I did not like so many schemes. I told him so, and I do not know but what I told a good many others when the subject has been (broatched), it would be natural for me to do it.
Q. If you thought these matters were all profitable and he was making money in them and the business of the bank properly conducted, why should you object?
A. Well, he might have met with setbacks (unror-seen), as business men, when they have too many irons in the fire, are liable to.
Q. And that might involve the bank?
A. Well, I do not know whether that thought occurred to me or not?
Q. There wasn't anything else you knew about Mosher?
A. I did not suppose he was meddling with the funds of the bank at all in these businesses that he had, and, if not, I did not see how that his having those schemes would be particularly danger-
73 ous to the bank; it was on the general principle that a man should give his attention to the banking business if he is in it, and not to something else.
Q. Did you know that Mosher was a large borrower of the bank?
A. No; I did not know that.
Q. Then where did he get the money to do all this business with?
A. I do not know; I had the idea and I was informed by Outcalt that he was making money. I suppose these different enterprises he was managing in such a manner that he made money by them.
Q. Outcalt had a farm down south here, didn't he, what was the name of that farm, didn't Outcalt have a farm down here called Grassland?
A. Yes, sir; I believe so.
Q. What was that farm devoted to?
A. He had a lot of horses there as I understand.
Q. And a race-track?
A. Yes, I believe so.
Q. Did you ever know anything about the private character of either of these men, did you ever hear any stories about them.
A. I have hear- some stories but never saw anything myself that I could judge from as being what it ought not to be. Still, I have had pretty good evidence from what I have heard others say, common report almost, that they were not what they ought to be, that is, particularly Outcalt; but then as far as that—here was our friend

Montgomery, president of the German National, he was of the same type as you may say, and I guess there might be a great many more added, if you were to go through society.

Q. Still he did not have any reputation that you would approve of as a cashier of a bank?

A. Outcalt?

Q. Yes, sir.

A. No; not exactly, but still I thought he was all straight in his business transactions.

Q. Did not you also hear some talk, and was not there some talk about Mosher himself being a little loose in his habits?

A. Well, I did not until quite—I do not know as I did until the bank failed. I used to think Mosher was all right in that line.

Q. Did not you hear some of these reports before you sold out?

74 A. I don't know that I did. I don't remember about that now; may and may not, I cannot tell.

Q. Do you remember saying to Gerner that about one-half of the capital stock was tied up in real estate?

A. No; I did not know that. When was that?

Q. Prior to the time you sold your stock?

A. No; I don't think I said it because I did not know it.

Q. You knew a large amount of it was?

A. I knew there was quite a block of it, how much I did not know.

Q. Did not you know there was over $100,000 of it?

A. No; I did not know that.

Q. Now, Mr. Stuart, what property did you have standing in your name at the date of this transfer?

FLANSBURG: Respondent objects as incompetent, immaterial, improper cross-examination and not the best evidence.

A. What property?

Q. Yes.

A. Do you mean in real estate?

Q. Yes, in real estate; for instance I will ask you here, did you own the south half of lots 4, 5, & 6, in block 27, Lincoln?

FLANSBURG: Respondent objects as incompetent and improper cross-examination.

A. At what time?

Q. Well, at the time you sold this stock, say the 17th day of December, 1892?

A. I don't remember just now whether I owned that then or not.

Q. You did own it at one time?

A. I did own it at one time.

Q. Is that valuable property?

FLANSBURG: Respondent objects as improper cross-examination, incompetent, no foundation laid.

A. Why, I don't know whether it would be considered valuable property or not.

Q. Where is that located?

A. It is located up here near the university; in front of it next to the new Conservatory of Music.

Q. That is your homestead?

A. Where I live; yes, sir.

Q. Is the title to that in your name?

FLANSBURG: Respondent objects as not the best evidence, incompetent, immaterial and improper cross-examination.

A. No.

75 (—.) Whose name is it in?

FLANSBURG: Respondent objects as not the best evidence, incompetent, immaterial, and improper cross-examination.

A. Charles Holland's.

Q. What was the value of that property in December, 1892?

FLANSBURG: Respondent objects as incompetent, immaterial, improper cross-examination, no foundation laid.

A. Well, I could not say; there has been different values put on it by different parties.

Q. What is the highest value that has been put upon it?

Flansburg objects as improper cross-examination, incompetent.

A. Well, I was asked if I would take $10,000 for it once.

Q. Did you take it?

FLANSBURG: Respondent objects as improper cross-examination, incompetent.

A. No, sir.

Q. You considered it worth $10,000 at that time?

FLANSBURG: Respondent objects as incompetent, immaterial, no foundation laid.

A. That was about boom time; perhaps I might have got it, I don't know.

Q. When did you convey that property?

FLANSBURG: Respondent objects as not the best evidence, incompetent, no foundation laid.

A. I do not remember just when it was transferred.

Q. Is it not true you conveyed that on the 5th day of December, 1893?

Flansburg objects as incompetent, no foundation laid, not the best evidence.

A. *Is it* possible; I don't remember the date.

Q. You conveyed it all in one deed, did you not?

FLANSBURG: Respondent objects as not the best evidence, incompetent, no foundation laid.

A. Yes, sir.

Q. Now, did you own the west half of lot 3 and 9.27 off of the east side of lot 4 in block 54 of Lincoln, now known as lot C in subdivision of lots 1, 2, 3, 4, 5 & 6, in block 54, Lincoln, Nebraska?

76 Flansburg objects as incompetent, improper cross-examination and no foundation laid, immaterial.

A. Yes, sir.

Q. What was the value of that in December 16, 1892, or about that time?

Flansburg objects as incompetent, immaterial, not proper cross-examination, no foundation laid.

A. Some would put one value on it and some another.

Q. What was the highest value put on it?

FLANSBURG: Respondent objects as incompetent, immaterial, not proper cross-examination, no foundation laid.

A. I have not had any value put on it as I know of.

Q. What, in your judgment, was it worth at that time?

Flansburg objects as incompetent, immaterial, not proper cross-examination, no foundation laid.

A. O, I don't know, I suppose it was worth $10,000 or $12,000.

Q. Did you own at that time lot C in Hogeland's subdivision of part of the south half of the northeast quarter of the southwest quarter of section 25, town. 10, north range 6 east, now in the city limits of Lincoln?

Flansburg objects as not proper cross-examination, not the best evidence, incompetent.

A. Yes; that is still in my name.

Q. And what was it worth?

FLANSBURG: Respondent objects as improper cross-examination, not the best evidence, incompetent.

A. That I don't remember.

Q. Give your best judgment?

FLANSBURG: Respondent objects as improper cross-examination, not the best evidence, incompetent.

A. Well, I don't know what it would sell for, I don't know whether it would sell for anything now; don't know whether I could sell it.

Q. What was it worth in December, 1892?

FLANSBURG: Respondent objects as improper cross-examination, not the best evidence, incompetent.

A. I don't know what it would have brought then.

Q. What did you pay for it?

FLANSBURG: Respondent objects as incompetent, immaterial, and not proper cross-examination.

77 A. I have forgotten that; I don't remember what I did pay for it; it was sort of a trade I think that came into my hands.

Q. What have you held it at?

FLANSBURG: Respondent objects as incompetent, immaterial, not proper cross-examination.

A. I suppose it ought to bring somewhere in the neighborhood of $400 or $500; I don't know as you could get that now; I don't believe you could.

Q. Did you (*you*) own about that time, December, 1892, lots 9 and 10 in block 59, Lincoln, Nebraska?

FLANSBURG: Respondent objects as incompetent, improper cross-examination, no foundation laid.

A. Yes; that stood in my name then.

Q. What was it worth? Give your best judgment.

FLANSBURG: Respondent objects as improper cross-examination, no foundation laid, incompetent.

A. I do not know what it would bring; it ought to be worth $12,000 or $15,000 anyway.

Q. Did you own at that time, lot 4 in block 41, Lincoln, Nebraska?

Flansburg objects as immaterial and not proper cross-examination.

A. I think that stood in my name; yes, sir.

Q. What was it worth?

FLANSBURG: Incompetent, no foundation laid and improper cross-examination.

A. Well, I do not know, I suppose that ought to be worth $10,000.00 or $12,000.00, but I do not know as you could sell it for that.

Q. Lots 7 & 8 in block 28, in Kinney's O Street addition, Lincoln, Nebraska, did you own that?

Flansburg objects as improper cross-examination, incompetent and immaterial.

A. I did own it; yes, sir.

Q. What was its value then?

Flansburg objects as incompetent and no foundation laid.

A. Well, I believe I paid $3,000.00 for it.

Q. Was it worth more than that?

A. Well, I don't know whether it would sell for more than that now.

78 Q. I mean in December, 1892, what did you hold it at then?

A. I don't remember, I am sure.

Q. Have you not held it at $5,000.00?
A. Well, I may have held it as high as that possibly.
Q. Lots 3, 4, 5, & 6, in block 2, in Spencer's addition to Lincoln, Nebraska, were you the owner of that in December, 1892?

Flansburg objects as immaterial and not proper cross-examination.

A. I think so; yes, sir.
Q. And what was its value then?

Flansburg objects as incompetent and no foundation laid.

A. Oh, I suppose, perhaps, $5,000.00 or $6,000.00.
Q. Did you own then, in December, 1892, lot 9 in the subdivision of lots 4, 5 & 6, in block 10 in Kinney's O Street addition to Lincoln, Nebraska?

Flansburg objects as immaterial and improper cross-examination.

A. Yes, sir; that stood in my name.
Q. What was its value then?

Flansburg objects as incompetent and no foundation laid.

A. It was appraised at $4,000.00 I think.
Q. What was its value, what would you put it?

Flansburg objects as incompetent and no foundation laid.

A. I suppose it would be somewhat more than that, $5,000 or $6,000.00; I do not know whether it would sell for that or not.
Q. The southwest quarter of section 14, town. 9 north, range 7 east, this is the Baily farm, did that stand in your name?
A. No.
Q. Did not he execute you a deed to that, and did not you execute back to him an agreement to convey the same on certain conditions?

Flansburg objects as incompetent, immaterial, not the best evidence, and improper cross-examination.

A. Yes; he executed a deed and it was of the nature of a mortgage, and the mortgage was foreclosed.
79 Q. Who bought in the property?
A. My wife bought it in.
Q. What was the mortgage on it?
A. There was a first mortgage on it, and there was a mortgage I think that had to be paid off, cleared, for some $2,000.00 or over.
Q. What was your mortgage?
A. $2,000.00 was what I had.
Q. What was the fair value of that farm?

Flansburg objects as incompetent, no foundation laid, improper cross-examination.

A. I don't know, I am sure.
Q. $6,000.00?
A. Well, it is doubtful whether you could get it.

Q. It was worth that then, wasn't it?

Flansburg objects as incompetent, no foundation laid, and not proper cross-examination.

A. I do not know as it was worth any more than it is now.
Q. Did you own the south half of the northwest quarter and the northeast (*east*) quarter of the southwest quarter, section 4, town. 7 north, range 7 east, situate in Lancaster county, Nebraska?

Flansburg objects as incompetent, immaterial and not the best evidence.

Q. Is that down near Hickman somewhere?
A. I don't know where that is.
—. The next farm is the southwest quarter of the southwest — of section 33, town. 8 north, range 7 east.
A. That is down in the neighborhood of Hickman. They are not far apart.
Q. What are those two pieces of land worth?

Flansburg objects as incompetent and no foundation laid.

A. I don't know, I am sure.
Q. What were they worth in 1892?

Flansburg objects as incompetent and no foundation laid.

A. I do not know, I could not say.
Q. Worth $30.00 an acre?
A. I don't know whether they would sell for that.
Q. They would have sold for that in December, 1892?

Flansburg objects as incompetent and no foundation laid.

80 A. I don't know whether they would or not.
Q. What did you hold them at?

Flansburg objects as incompetent and immaterial.

A. I suppose somewhere in the neighborhood of $5,000, or such a matter.
Q. $5,000.00 apiece or together?
A. No, the whole thing; together they make up about a quarter section.
Q. Did you own at that time lots D, E & F, in the subdivision of lots 5 & 6 in block 39 in Lincoln, this Gruetter-Joers property?
A. Yes, that stood in my name then, I think.
Q. That is the property you bought of A. T. Gruetter & Company, or Gruetter & Joers?
A. Yes, sir.
Q. You valued that at $65,000.00?

Flansburg objects as incompetent and no foundation laid.

A. Why no, I don't think I can get——
Q. What did you value it at then?

Flansburg objects as incompetent and no foundation laid.

A. I paid on the basis of $67,500.00, but I don't suppose I could sell it today for $50,000.00.

Q. Did you consider it worth that?

Flansburg objects as incompetent and no foundation laid.

A. Well, I suppose that if the property would pay the rental of $6,000.00 a year for a long lease that it ought to be worth somewhere in that neighborhood.

Q. Did you think it worth that at the time you bought it?

Flansburg objects as incompetent and no foundation laid.

A. I should not have paid it probably if I had not some such idea.

Q. What was your estimate as to its value then without reference to a lease?

Flansburg objects as incompetent and no foundation laid.

A. Well, I had to take it altogether, considering the lease and the property, that was the way I figured it. I don't think
81 I would have paid as much for it if it had not been for the lease.

Q. Taking the lease and all, what did you estimate it to be worth?

Flansburg objects as incompetent and no foundation laid.

A. Oh, I do not know, I am sure. I think that—well, I think $60,000.00 would be a pretty fair price for it even then, but now I don't suppose I could get $50,000.00.

Q. So then, there was $30,000.00 due on the mortgage and $20,000.00 in money; so according to your valuation this $15,000.00 worth of stock instead of being worth $18,000.00 was only worth $10,000.00 according to your own estimate?

Flansburg objects as incompetent and no foundation laid.

A. No; the estimate was taking the lease altogether, I thought $67,500.00 would be a fair valuation altogether, but taking them apart without the lease I would not have paid as much for it.

Q. You would have paid just $60,000.00?

A. I should have thought that a pretty fair price for it.

Q. A little while ago you said you thought even counting the lease and everything it was only worth about $60,000, do you want to take that back?

Flansburg objects as incompetent and no foundation laid.

A. Well, it is not worth that now.

Q. I am asking what it was worth then, what you thought (*you thought*) it was worth in December, 1892? You testified you thought counting the lease and everything it was worth $60,000.00, do you want to take that back?

Flansburg objects as incompetent and no foundation laid.

A. No; I say I considered it with the long lease $67,500. That was my estimate I put on it.

Q. Now returning to this property, all of this property which I have read to you, and which you owned in December, 1892?

Flansburg objects as incompetent, not proper cross-examination and immaterial.

A. Not all of it, no.

82 Q. In December, 1892, it nearly did, all except what you bought of Gruetter & Joers?

Flansburg objects as incompetent, immaterial and not proper cross-examination.

A. This Bailey farm never stood in my name.
Q. With that exception it all stood in your name?
A. Yes, sir; I guess the rest of it did.
Q. You owned it?

Flansburg objects as incompetent, immaterial and not proper cross-examination.

A. Well, I had the title to it.
Q. Did not you own it?

Flansburg objects as incompetent, immaterial, calling for a conclusion and not proper cross-examination.

A. If a man has a title to it he owns it.
Q. Did not you own it, and did not it belong to you?

Flansburg objects as incompetent, immaterial, calling for a conclusion and not proper cross-examination.

A. Certainly, because I had the title to it.
Q. Now, — has the title to all that property?

Flansburg objects as not the best evidence, incompetent, immaterial and not proper cross-examination.

A. Charles Holland.
Q. Who owns it now?
A. Charles Holland.
Q. Do you say he owns it because he has the title to it?

Flansburg objects as not the best evidence, incompetent, immaterial and improper cross-examination.

A. Yes, sir.
Q. Is not that your property just as much now as it was then?

Flansburg objects as not proper cross-examination, incompetent, immaterial and no foundation laid.

A. No, sir.
Q. Don't you own it just as much as you did then?

Flansburg objects as not proper cross-examination, incompetent, immaterial and no foundation laid.

A. No, sir.
Q. Except that you have put the title into his name?

83 Flansburg objects as not proper cross-examination, incompetent, immaterial, and no foundation laid.

A. No, sir.

Q. Have you got any interest in it now, either equitable or inequitable?

Flansburg objects as not proper cross-examination, incompetent, immaterial, and no foundation laid.

A. I have charge of it the same as I did before.

Q. Have you not got an interest in it—I will ask you without any quibbling, have you got any interest in it?

Flansburg objects as not proper cross-examination, incompetent, immaterial, and no foundation laid.

A. I do not see how I can have any interest in it when the title is in another.

Q. I am asking you as a matter of fact as between you and Holland, are not you the real owner of that property, but the title is in him?

Flansburg objects as not proper cross-examination, incompetent, immaterial, and no foundation laid.

A. If the title is in him he owns it.

Q. (*Ts*) that the only reason why you say he owns it?

Flansburg objects as not proper cross-examination, incompetent, immaterial, and no foundation laid.

A. I think that is enough. If a man has the title to a piece of property it is his property it seems to me.

Q. You had the title to the Baily farm, did you not?

Flansburg objects as incompetent, immaterial, not the best evidence, and improper cross-examination.

A. No.

Q. You had the deed to it?

Flansburg objects as immaterial and improper cross-examination.

A. Yes.

Q. This property was all in good condition, was it not?

Flansburg objects as incompetent and improper cross-examination.

A. In good condition; I don't know what you mean by that.

Q. It was good and valuable property?

A. Some of it was pretty good property.

Q. You know the values of property in the city of Lincoln?

A. Oh, it was fair property, I suppose, some of it.

84 Q. You have bought and sold a good deal of property in and about Lincoln, have you not?

A. Some; not very much.

Q. You know the values of real estate in a general way, do you not?

A. In a general way, perhaps.
Q. This property was all incumbered, was it not, except the Gruetter & Joers property?
A. I think most of it was; I don't know but all at that time.
Q. Did you have any liabilities in December, 1892—any notes outstanding?

Flansburg objects as improper cross-examination, incompetent, and immaterial.

A. Yes, sir.
Q. What were they?

Flansburg objects as improper cross-examination, incompetent, and immaterial.

A. Well, I had—that is going into my private affairs. I do not know whether I am at liberty to say exactly what my debts were.
Q. It bears on the question of intent here?
A. I had debts.
Q. What did they amount to?

Flansburg objects as improper cross-examination, incompetent, and immaterial.

A. I do not know.
Q. What did they amount to; give it approximately?

Flansburg objects as improper cross-examination, incompetent, and immaterial.

A. I do not know, I say.
Q. Did they amount to $5,000.00?
A. I could not tell without reckoning them up—going over the papers.
Q. They would not amount to more than $5,000.00?
A. I could not say.
Q. Who were they due to?

Flansburg objects as improper cross-examination, incompetent, and immaterial.

A. Different parties.
Q. Name them.

Flansburg objects as improper cross-examination, incompetent, and immaterial.

85 A. I do not know whether I am under obligations to name the parties that I was in debt to.
Q. Do you decline to name them?
A. It does not seem to me that it is pertinent at all here.
Q. Do you refuse to tell the notary? The court can pass on that afterwards as to pertinency.

Flansburg objects as improper cross-examination, incompetent and immaterial.

A. I do not think I am under any obligations to name my creditors.

Q. Do you owe your wife anything?

Flansburg objects as improper cross-examination, incompetent and immaterial.

A. Why, yes, I am owing her now.

Q. Was she your principal creditor?

Flansburg objects as improper cross-examination, incompetent and immaterial.

A. One of them.

Q. Was she your principal creditor?

Flansburg objects as improper cross-examination, incompetent and immaterial.

A. I don't know whether you could say she was the principal.

Q. Did you owe anybody else?

Flansburg objects as improper cross-examination, incompetent and immaterial.

A. Yes, sir.

Q. Name one of them.

Flansburg objects as improper cross-examination, incompetent and immaterial.

A. I don't think I am under any obligations to name my creditors.

Q. You refuse to do that?

A. I think I will refuse to do it.

Q. Did you owe this man Holland anything at that time?

Flansburg objects as improper cross-examination, incompetent and immaterial.

A. I think so.

Q. How much did you owe him?

Flansburg objects as improper cross-examination, incompetent and immaterial.

86 A. I don't know.

Q. Did you owe him $1,000.00?

A. I have done considerable business with him, and how we stand I don't know.

Q. Do you owe him $500.00?

Flansburg objects as improper cross-examination, incompetent and immaterial.

A. I could not say.

Q. Did you owe him $100.00?

A. I have owed him a good many thousands at different times.

Q. Did you at the time, in December, 1892, owe him a $100,000.00?

Flansburg objects as improper cross-examination, incompetent and immaterial.

A. I don't remember.

Q. At the time this deed was made, in December, 1893, the year after, did you owe Holland anything?

Flansburg objects as improper cross-examination, incompetent and immaterial.

A. I don't remember.

Flansburg objects as incompetent and immaterial.

A. It is specified in the deed, and I see you have looked up the property, and it is specified there what the consideration is.

Q. I want to know what the consideration was, not what is specified in the deed, what was the real consideration of that transfer?

Flansburg objects as incompetent and immaterial.

A. The real consideration was $100,000.00, as I remember.

Q. Did he pay you $100,000.00?

A. No, it was not paid, all of it.

Q. How much has he paid you?

Flansburg objects as incompetent and immaterial.

A. I don't remember just how much.

Q. Has he paid you $100.00?

A. I don't remember.

Q. Has he paid you $200.00?

A. I don't remember.

Q. Has he paid you $300.00?

A. That I don't remember.

Q. Did you take a note from him for it?

A. The transaction is not fully completed yet.

87 Q. What (was) it lack to complete?

Flansburg objects as incompetent and immaterial.

A. That is a matter between him and me.

Q. You refuse to state, do you?

Flansburg objects as incompetent and immaterial.

A. That is private business.

Q. You decline to state?

Flansburg objects as incompetent and immaterial.

A. Yes, sir.

Q. Was there an agreement between you and him, whereby he was to reconvey his property on any considerations?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. No.

Q. Has he made a deed to this property, to you or to any one at your request?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. That is a matter between us, and private.

Q. Has not he made a deed of all his property to your wife at your request?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. Well, I decline to state.

Q. Has your wife got a secret, unrecorded deed of all this real estate?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. I decline to state.

Q. Who is Holland, anyway?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. He is a man.

Q. What is his business?

A. Well, he is what you might say retired from business now.

Q. What was his business before he retired?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

88 A. Well, he was in the mining business for a while.

Q. What other business?

A. Then he has run a farm, too, for a while.

Q. What other business—preacher, wasn't he, for a while?

A. Not to my knowledge.

Q. Was he never a preacher?

A. I did not know he was.

Q. Not a man of any means?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. Yes, he is a man of means, of some means.

Q. What was he worth?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. I don't know.

Q. Worth $5,000.00?

A. I could not tell.

Q. What was your object of conveying this property to Holland, anyway, what was the purpose of it?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. Well, I decline to state what my purpose was.

Q. Was not your real purpose, Mr. Stuart, in conveying this property to Holland to defeat the collection of any suits that might be brought against you by the receiver of the Capital National bank,

of any kind or character, arising out of your connection as a director and stockholder of the Capital National bank?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. I do not know but that a man would be justified in doing that; I do not say that was my motive, however.

Q. Was not that your motive, Professor?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. I decline to say; it is going into things which it seems to me are not particularly pertinent to this examination.

Q. Have you any property nowhere in your name?

A. Why no, I don't know as I have in the city; I have not any property in the city in my name.

Q. Have you any in this State or county?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

89 A. Why that property down at Hickman is, I think, in my name.

Q. When did it get into your name; it was this deed, I think; was not that included in the deed to Holland?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. You ought to know.

Q. Well, I asked you, though.

A. As you have been looking up the affairs and business, I will let you find it out.

Q. I am not testifying now and you are.

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. I decline to state that.

Q. Was it your intention to put it in a deed to Holland?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. Well, I do not say whether it was or not.

Q. You have a power of attorney from Holland, have you not?

A. Yes; did have; have it now.

Q. That power of attorney authorizes you to act for him in all matters; to convey and deed real estate and to collect rents, to settle lawsuits and commence lawsuits and confirm to arbitration, and to do all things in the fullest possible character that he could himself do if he was there, does it not?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. Well, I do not remember exactly the limits of the powers, but

it gives me the power to take charge of his business here in a general way.

Q. How long have you had that power of attorney?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. Well, I have had it a good many years; pretty near ever since I have been here, I think.

Q. Do you know the date of that power of attorney?

A. I don't remember.

Q. Is not the date of that power of attorney December 2nd, 1882?

A. I do not know; I do not remember.

90 Q. So you have deeded away all this property which you have owned here in the city to Holland, knowing that you held the power of attorney that authorized you to deed it to some one else, is not that true, and you could convey and manage it as fully as if you owned it?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. Well, I have the power to take charge of it and collect the rents and take care of them.

Q. Did you ever send this deed to Holland at all?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. I sent him a deed; yes, sir.

Q. Did you ever send him this deed which you put upon record conveying all this property to him?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. I do not remember whether I sent him that deed; I think yes; I guess I did.

Q. Do you think he knows of this transfer, this conveyance?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. Oh, certainly.

Q. Did not you immediately after putting this deed upon record from yourself to Holland execute a deed under your power of attorney from Holland to your wife?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. Well, I decline to state that; I do not think it is pertinent at all.

Q. You refuse to answer that question?

A. Yes, sir.

Q. Are you willing to bring here and produce before the notary and allow the same to be introduced in evidence all of the correspondence between yourself and Holland relative to the conveyance

of this property, all deeds from you to him so far as you have them, and all deeds and conveyances from him to you, whether executed by him personally or under your power of attorney or to your wife, and any other agreement or correspondence?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

91 Q. Do you collect the rents on all this property?

Flansburg objects as incompetent, immaterial and not proper cross-examination.

A. On most of it.
Q. What did you do with those rents?
A. Pay taxes, repairs and so on.
Q. What do you mean by so on?
A. Well, whatever his paying assessments and sidewalks were.
Q. After you have paid all of your paying expenses, taxes, repairs, etc., what do you do with the rest of it?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. I don't have much left.
Q. You have some left, what do you do with it?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. I don't know whether I have any left or not, it is a question.
Q. Do you keep any account of it?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. Yes; keep strict account.
Q. Have you ever remitted any of it to Holland?
A. That is my private business, I don't choose to divulge it.
Q. Is it not a fact that this money you collect from these various properties after paying expenses, repairs, and taxes, etc., you keep and use it just the same as you did when the title to the property stood in your name?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. I decline to answer all of these questions that are my private business and do not concern anybody else.
Q. Was not, Mr. Stuart, the object of making this transfer to beat any judgment that might be obtained in this suit if a decree was rendered by this court requiring you to pay in the amount of this assessment?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. No; (*it*) a decree is rendered I hope to be able to pay it, but

I do not expect there will be any decree rendered against me,
92 because I do not think I am amenable to any decree, I don't think you can obtain one.

Q. What was your object then?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. That is my own private business.

Q. Was not your object in conveying this to him to defeat any judgment that might be obtained against you arising out of the ailure of the Capital National bank?

Flansburg objects as incompetent, immaterial, and not proper cross-examination.

A. That is my own affair, and I decline to answer.

Q. Mr. Stuart, I wish you would look over a part of the list of bills receivable here, which Mr. Hayden has testified to and put in evidence, and see if any of these bills (receiveable) you recognize as having been in the bank. Before you examine them, I will ask you if you did not know that there was, about the time you sold your stock, $141,000.00 of bills receivable that were out in the hands of collectors that were overdue?

A. No, sir; I did not know that. Why, it is very difficult for me to make any statement about these parties, I do not remember the names now, so long ago I could not identify these parties.

Q. Do not you know as a matter of fact, that four-fifths of the bills receivable by the bank at the time you sold your stock, were in fact, bad paper?

A. No; I did not know that.

Q. You know it now, do you not?

A. Well, if that is the statement made by those that have the matter in charge, I suppose I would have to believe it.

Redirect examination.

By Mr. FLANSBURG:

Q. Now, this *t*satement that Mr. Lambertson has just submitted to you, covering $141,011.44 of bills receivable, shows upon its face that these bills receivable were not on hand, do you know whether they were ever on hand when you were examining the bills receivable or not?

A. Well now, I could not tell, because I could not remember the names, I could not do that.

Q. Now, with reference to this statement of September 30th, 1892, regarding the condition of the bank at that time, your name
93 appears signed to the attestation as one of the directors, did you examine this statement at the time it was presented to you?

A. Not particularly; no, I did not examine any of the statements particularly, simply signed my name, supposing that they had got the thing all right. The confidence that I had in the management

was such as lead me to do that. Of course I do not think I should do it again, but I suppose every director does the same thing here in the banks now. I should like to ask Mr. Lambertson——

Q. Never mind that. Mr. Lambertson called your attention on the back of this paper to two items he described as E. W. Mosher, $48,950.28, and J. W. Small, $56,750.53. Do you remember whether that was there when you signed this report?

A. I do not know.

Q. Did you see anything there that states that is bad paper?

A. No, I do not, and I do not know whether that paper of Mosher's, E. W., had Charley's name on the back of it then or not, but the last notes that E. W. Mosher had in the bank had Charley's name on the back, and I regarded them as gilt-edged.

Q. You do not find anything on this statement to show that this is bad paper?

A. I do not find anything there that shows that it is bad paper.

Q. You stated in your cross-examination to Mr. Lambertson on the value of this property that you considered the building down here, the building of Gruetter & Joers, in the making of that trade worth $60,000.00, taking into consideration the lease; I also understand you to say that you consider it worth $67,500.00, considering the lease. What did you mean to say?

A. I mean to say $67,500.00, considering the lease, and without the lease a less value. I don't think the property would be worth $67,500.00 if there was not a good lease connected with it.

Q. I will ask you if the lease or the rentals due under the lease have been paid by Gruetter & Joers?

Lambertson objects as incompetent, irrelevant and immaterial.

A. The first year has been paid, but last year has not been paid, only about half.

Q. I understood you to say, in response to question of Mr. Lambertson, that you drew out a little over $10,000.00 between the time you made the sale of your bank stock to Gruetter & Joers and the time the bank burst up. Now, how much money did you
94 have in there at the time of the transfer to Gruetter & Joers in certificates and open accounts all told, that is in the Capital National bank?

A. Well, somewhere in the neighborhood of $13,000.00, I think, that is, I and my wife together.

Q. Then this $10,000.00 that you say you drew out after making the sale to Gruetter & Joers was the $10,000.00 you drew out in payment of that deal, wasn't it?

A. Yes, that is the certificates of deposit, and $1,000.00 check for binding the bargain.

Q. You only had $13,000.00 in there all told?

A. Somewhere about that, might have been a little more.

Q. I understood you drew out all that you had in the Industrial savings bank?

A. Yes, sir.

Q. And all you had deposited in the Lincoln savings bank?

A. Yes, all of the stock. I sold the stock there, and that was converted into cash.

Q. And you applied this in the payment of the consideration to Gruetter & Joers, and then took enough out of what you had in the Capital National bank to make up the difference and left the balance of your money in the Capital National bank?

Lambertson objects as leading.

A. Yes, sir, left the balance in the Capital National bank.

Q. How much was there then on hand in the Capital National bank?

A. At that time?

Q. Yes, sir.

A. About $2,500.00.

Q. And how much of that was drawn out between the time of the transfer of this stock to Gruetter & Joers and the bursting up of the bank or close of it?

A. There was not any of it drawn out, more put in—that is to say, I tried to make a deposit the very Saturday the bank closed; it did not open Monday, but I did not get to the bank quite soon enough to get the deposit in.

Q. You say you passed upon such paper of the bank as was set out for the finance committee to examine? I understood you to say that this morning.

A. Yes, sir.

Q. Was there ever any paper of Donald, Losson & Simpson there for your inspection?

A. No, sir, I never saw any.

Q. Any of the paper of the Sherman Count*ing* Banking Company there for your inspection?

A. No, never saw any of that.

95 Q. This Small paper, was there any of that presented to you for inspection?

A. I do not remember seeing any of that. As I said before, they kept that poor paper out of the way.

Q. I understand you to say, that you had heard there was some slight loss in some of those matters that I have mentioned, the Donald, Losson & Simpson, the (Small) and the Sherman County Banking Company?

A. Yes; about the Sherman County Banking Company, I do not know, that matter was in litigation as I understood it; the prospect was they would not lose anything there.

Q. What did you understand this real estate was for from Clay county?

Lambertson objects to his stating his understanding, as incompetent, irrelevant and immaterial.

A. That was on account of the Small business.

Q. Now, you say that at several times, Mr. Stuart, you took a tab and pencil and made some memoranda of bills receivable that were objectionable; to whom did you present them, if anybody?

A. I just jotted them down, the names of the parties, and then called the attention of Mosher and Outcalc to them, to get an explanation of what security was there, on what terms the loans had been made, so as to know whether the paper was good or not.

Q. And did you ultimately pass this paper?

A. Yes, frequently and almost always they would make such an explanation as seemed to me satisfactory.

Recross-examination.

By Mr. LAMBERTSON:

Q. Were you acquainted, Mr. Stuart, with the standing of the makers of the bills receivable of the bank?

A. A good many of them or most of them, quite a number of them, that is I thought I knew something about their standing; it is pretty difficult sometimes to know who is good and who is not.

Q. You were connected with two or three other banks in the city, were you not?

A. I was connected with the Lincoln savings bank.

Q. Were you a director of that bank?

A. I was vice-president of it.

Q. Were you a director of the Industrial savings bank?

A. I was not at the time, then, I think; I believe I am now.

Q. You had in these other banks an opportunity of familiarizing yourself with the responsibility and standing of the makers
96 of the bills receivable at the bank, and borrowers of money in this community?

A. More or less so, yes, sir.

Q. So that you felt competent in a general way to pass upon the value of the bills receivable of the Capital National bank?

A. Well, not as fully so as I could wish, but perhaps as much so as other members of the board.

Q. Where is Mr. Mosher, president of this concern, now?

A. Well, I do not know where he is except what report says he is at Sioux Falls.

Q. Serving out a sentence at Sioux Falls?

A. That is what I understand.

Q. What would you consider to be the fair rental value of that property which you purchased of A. T. Gruetter & Company at the time you made the purchase?

A. I considered the rental value which he agreed to pay as being a fair rental.

Witness excused.

W. C. BROOKS, a witness of lawful age, being first duly sworn, testifies as follows:

Examined by Mr. FLANSBURG:

Q. State your name and residence.

A. W. C. Brooks; my place of business is No. 101 South 11th street, Lincoln; real estate and merchandise.

Q. How long have you been engaged in this business?
A. About four years.
Q. Are you acquainted with the respondent, Ambrose P. S. Stuart?
A. Yes, sir.
Q. And A. T. Gruetter and Charles F. Joers?
A. Yes, sir.
Q. Did you ever have any business for Gruetter & Joers in December, 1892, and with Professor Stuart, the respondent?
A. I did, yes, sir.
Q. Was that affecting or concerning the building down on 13th street known as the Gruetter & Joers block?
A. It was, yes, sir.
Q. Will you state the circumstances that lead up to the making of that contract, the conversations you had with Professor Stuart and that he had with you, and how you happened to speak to him upon the subject; go on and tell the circumstance?

Lambertson objects as incompetent, irrelevant, immaterial and leading.

97 A. I had this block down there for sale, and knew at the time that Professor Stuart had some idle money, and went up to see him about selling the block, and he told me that he did not have money enough to buy it, was the first conversation; and we talked about the amount of money and the price of the block, in the start I think we asked $70,000.00 for the block, and finally agreed upon the price of $67,500.00 later on. After talking for some time in regard to the price and location, the way the building was constructed—why I would not say whether it was the first time I went up to see him or the second time, I asked him if he could not put in something else if he did not have money enough, if he could not put in some stock, I mentioned the insurance stock, the Farmers' & Merchants' Insurance Company, and this bank stock which I knew he was interested in both of them. His wife was present, Mrs. Stuart, and he said he did not care to put in his bank stock at the start, because he thought that was pretty good property, but Mrs. Stuart spoke up and said if he could get all his property in one lump she though- he had better consider that about putting his bank stock in——

Lambertson objects to the testimony of what Mrs. Stuart said as incompetent.

(Witness continues:)—and he wanted one and a quarter for his bank stock, and finally he decided if they would take the bank stock at one and a quarter, he would, and I went and saw Messrs. Gruetter & Joers, and they would not pay one and a quarter for it, did not want it at all, at any price, but finally decided if they could get it at what they would find out it was worth, they would take it, and they looked the matter up and we figured back and forth for maybe one or two or three days, and they decided they would take it at $1.20, and they agreed on that, or whether they offered to compromise on $1.20, it is over two years ago, I cannot recollect that, but

it was agreed that it should be taken at $1.20, and we made a contract, paid $1,000.00 down, Professor Stuart gave his check for $1,000.00, and I took it down and gave it to Messrs. Gruetter & Joers, who signed the contract and the papers were delivered. I went with Professor Stuart down there and he gave them part on certificates of deposit and this bank stock and assumed the mortgage of $30,000.00, and paid them the rest in money, or rather gave his check for it.

Q. Who were you representing in this transaction when you first saw Professor Stuart?

A. Gruetter & Joers.

Q. You say you were present when the transaction was finally consummated?

A. Yes, sir.

98 Q. And it was consummated upon the terms that you had practically agreed upon before that, was it?

A. Yes, sir.

Q. Did Professor Stuart ever pay you any commission for making this transaction?

A. No, sir.

Q. Who did pay your commission in this, or agree to?

A. Gruetter & Joers.

Cross-examination.

By Mr. LAMBERTSON:

Q. What did Mr. Stuart say about this stock?

A. He said that he had been offered one and a quarter for it at one time prior to this.

Q. What else did he say about the bank?

A. He did not say anything to me; he did not make any representations about the bank, more than he made at the time we talked over the building there when we closed the deal, there was Mr. Gruetter, Mr. Joers, Mr. Stuart and myself when he spoke about the condition the bank was in. They had had to take some lands, he said, and when they were disposed of the bank would be, in his opinion, in good shape, that (make) it a little slow, they were going to pass the commission.

Q. Commission or dividend?

A. The dividends, I should say.

Q. How much did he say was tied up in land?

A. Well, I could not tell you just now.

Q. Did he say $100,000.00?

A. Well, sir, I could not say how much that was; that was not the part I was interested in.

Q. He said the bank after it realized on those lands, thought it would pay good dividends, and would be a good investment?

A. Yes, he considered it so.

Q. Said so to Gruetter at that time?

A. Yes, it had paid and thought it would again.

Q. Did he say anything about he might buy it back himself again if he made a turn?

A. There was some talk about it at the time.

Q. He made some statement like that, did he not, he would buy it back himself if he could make a turn and get hold of some property?

A. If he could realize on some of his investments, it was property he would like to have, have it back at some time.

Q. At the same price?

99 A. I do not think anything was said about the price; I would not say, but that would be my recollection.

Witness excused.

The respondent offers in evidence Exhibit "6," being the proceedings in a case pending in the district court of Lancaster county, Nebraska, in which Augustus T. Gruetter and Charles F. Joers are plaintiffs and Ambrose P. S. Stuart, defendant.

It is agreed by and between the parties that the signatures of the witness- to the foregoing depositions be waived.

EXHIBIT "I."

C. W. Mosher, pres't; H. J. Walsh, vice-pres't; R. C. Outcalt, cash'r; J. W. Maxwell, ass't cash'r.

Capital National bank.

Capital, $300,000.

LINCOLN, NEB., ——, 188–.

Interest received		$42,082 82
Left over		305 12
		42,387 94
Interest paid		10,749 88
		31,638 06
Wages	7,769 93	
Expenses	2,990 27	
		10,760 20
		20,877 86

EXHIBIT "2."

C. W. Mosher, pres't; H. J. Walsh, vice-pres't; R. C. Outcalt, cash'r; J. W. Maxwell, as't cash'r.

Capital National bank.

Capital, $300,000.

LINCOLN, NEBR., *July* 3, 1890.

Left over		1,098 54
Interest received		34,751 76
		35,850 30
Interest paid	7,452 81	
Expenses	4,072 23	
Wages	6,824 98	
		18,350 11
Net profit		17,500 19

100 EXHIBIT 3.

C. W. Mosher, pres't; H. J. Walsh, vice-pres't; R. C. Outcalt, cash'r; J. W. Maxwell, ass't cash'r.

Capital National bank.

Capital, $300,00-.

LINCOLN, NEB., ——, 18—.

Left over		589 38
Interest received		38,807 51
		39,405 89
Wages	$6,699 98	
Interest paid	10,223 91	
Expenses	4,383 46	
		21,307 35
Net profit		18,098 54

EXHIBIT "4."

C. W. Mosher, pres't; H. J. Walsh, vice-pres't; R. C. Outcalt, cash'r; J. W. Maxwell, as't cash'r.

Capital National bank.

Capital, $300,00–.

LINCOLN, NEB., *July* 9, 1889.

Left over from Jan.....		877 86
Gross interest receipts.....		39,770 89
For six months.....		40,648 75
Paid wages.....	6,811 64	
" interest.....	8,940 94	
" expense.....	4,297 79	
		20,050 37
Net profits.....		20,598 38

EXHIBIT "5."

C. W. Mosher, pres't; H. J. Walsh, vice-pres't; R. C. Outcalt, cash'r; J. W. Maxwell, as't cash'r.

Capital National bank.

Capital, $300,000.

LINCOLN, NEB., *July* 10, 1888.

Statement.

Left over Jan'y 1, '88.....		54 59
Interest earned to July 1, '88.....		38,240 90
		38,295 49
101 Paid out:		
Wages.....	6,678 13	
Expenses.....	5,583 29	
Interest.....	5,728 95	
		17,990 37
Net earnings.....		20,305 12

EXHIBIT "6."

Petition.

In the District Court for Lancaster County, Nebraska.

AUGUST T. GRUETTER and CHARLES F. JOERS, Plaintiffs,
vs.
A. P. S. STUART, Defendant.

For cause of action herein the plaintiffs say that hitherto and on and prior to the 23rd day of December, 1892, these plaintiffs were the owners of a certain tract of real estate situate in the city of Lincoln, Lancaster county, Nebraska, particularly described as being lots D, E, and F, of Baldwin's subdivision of lots numbers five (5) and six (6), in block numbered thirty-nine (39), according to the original recorded plat of the town, now the city, of Lincoln, Nebraska, upon which there was a mortgage to secure an indebtedness of thirty thousand dollars ($30,000), and that on or about said day the above-named defendant, who was then the owner in his own name of one hundred and fifty (150) shares of the nominal or face amount of one hundred dollars ($100) each of the capital stock of the Capital National bank of Lincoln, Nebraska, an incorporation duly organized and doing business as a banking association at Lincoln, Nebraska, under the national banking act of the United States, falsely and fraudulently and for the purpose and with the intent to cheat and defraud these plaintiffs, represented and stated to these plaintiffs that he, the said defendant, well knew the condition of said bank and the value of said shares of stock, and that said bank was in a safe and solvent condition and abundantly able to pay its indebtedness, and that said stock was fairly and reasonably worth the sum of at least one dollar and twenty-five cents ($1.25) per share, or eighteen thousand dollars ($18,000) in full, and proposed and urged that these plaintiffs should accept said stock at said sum and valuation of eighteen thousand dollars ($18,000) upon and as a part of the purchase price of said real estate, which these plaintiffs were then about to sell, and did sell, to said defendant for the agreed price of thirty-seven thousand five hundred dollars ($37,500), subject to said mortgage indebtedness and lien. And these plaintiffs further say, that being wholly ignorant in the premises and relying solely and implicitly upon the said statements and representations of said defendant, and believing them to be true, these plaintiffs did, on or about said last-named day, sell and convey said property to said defendant for said sum of thirty-seven thousand five hundred dollars ($37,500), subject to said incumbrance, that being the fair and reasonable market value thereof, and received from said defendant an assignment of said stock as and for the said sum of eighteen thousand dollars ($18,000.00) as part of the said purchase price of said property, which assignment was made to these plaintiffs, by the name of Gruetter and Joers. Yet these plaintiffs say that at and for long prior to said 23rd day

102

of December, 1893, and at and before the time of the making of said representations by said defendant, and at and before the date of the sale and conveyance of said property by these plaintiffs to said defendant and the assignment by him to them of said shares of stock the said defendant well knew that said bank was wholly insolvent and unable to pay its debts, and that the said shares of its capital stock were wholly valueless.

And these plaintiffs further say that as a matter of fact at the time of the making of said representations and at the time of said sale and conveyance and at the time of the assignment by the said defendant to these plaintiffs, as aforesaid, of said shares of capital stock, and at all times since, the said bank has been in fact wholly insolvent and unable to pay its debts, and the said shares of stock have been and now are wholly valueless, and that by reason of the premises these plaintiffs have suffered damages in the sum of eighteen thousand dollars ($18,000), for which amount, and interest thereon, from the 23rd day of December, 1892, and costs of this action, they pray judgment against the defendant.

JOHN H. AMES,
E. F. PETTIS,
Plaintiffs' Attorneys.

STATE OF NEBRASKA, } ss:
Lancaster County, }

August T. Gruetter, being by me first duly sworn, says that he is one of the plaintiffs in the above-entitled action named,
103 and that he believes the facts stated in the foregoing petition are true.

AUGUST T. GRUETTER.

Subscribed in my presence and sworn to before me this 23rd day of January, 1893.

[SEAL.]

F. H. WOODS,
Notary Public.

Indorsed: August T. Gruetter and Charles F. Joers *vs.* A. P. S. Stuart. Petition. Clerk's office, district court. Filed Jan. 23, 1893. E. Baker, clerk dist. court.

Certificate.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

I, E. Baker, clerk of the district court, third judicial district of Nebraska, in and for said county, do hereby certify that the above and foregoing is a true and correct copy of the petition, with all the indorsements therein, in a cause now pending in said court, wherein August T. Gruetter *et al.* are plaintiffs and A. P. S. Stuart is defendant, as the same appears fully upon the records and files of said court and now in my charge remaining as clerk aforesaid.

In testimony whereof I have hereunto set my hand officially and

affixed the seal of said court, at Lincoln, this 26th day of February, A. D. 1895.

E. BAKER, *Clerk D. C.*,
[SEAL.] By W. W. KERLIN, *Deputy.*

Answer.

District Court, Lancaster County, Nebraska.

AUGUST T. GRUETTER and CHARLES F. JOERS, Plaintiffs,
vs.
A. P. S. STUART, Defendant.

Comes now the defendant A. P. S. Stuart and, for his answer to the petition of the plaintiff, admits that in December, 1892, but on and prior to the 22nd day of said month, said plaintiffs were the owners of the land described in said petition; that there was a mortgage lien on the same for $30,000, and that at said time this defendant was the owner of 150 shares of the capital stock of the Capital National Bank of Lincoln, Nebraska.

104 This defendant, further answering, admits that said plaintiffs sold and conveyed to this defendant the land described for the sum of $37,500, subject to the mortgage aforesaid, and that this defendant assigned to said plaintiffs said capital stock aforesaid as part of the purchase price of said property, at said valuation of $18,000.

And further answering, this defendant denies each and every allegation in said petition contained except as hereinbefore specifically admitted.

Wherefore this defendant prays to be hence dismissed with his costs.

S. L. GEISTHARDT &
C. C. FLANSBURG,
Attorneys for Defendant.

STATE OF NEBRASKA, } ss:
Lancaster County, }

A. P. S. Stuart, being first duly sworn, says he is defendant in the above action and believes the allegations on the foregoing answer to be true.

A. P. S. STUART.

Subscribed and sworn to before me this 27th day of February, 1893.

[SEAL.] S. L. GEISTHARDT,
Notary Public.

Indorsed: District court, Lancaster county. August T. Gruetter and Charles F. Joers *vs.* A. P. S. Stuart. Answer. Clerk's office, district court. Filed Feb. 27, 1893. E. Baker, clerk dist. court.

Certificate.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

I, E. S. Baker, clerk of the district court, third judicial district of Nebraska, in and for said county, do hereby certify that the above and foregoing is a true and correct copy of the answer, with all the indorsements thereon, in a cause now pending in said court, wherein August T. Gruetter *et al.* are plaintiffs and A. P. S. Stuart is defendant, as the same appears fully upon the records and files of said court and now in my charge remaining as clerk aforesaid.

105 In testimony whereof, I have hereunto set my hand officially and affixed the seal of said court at Lincoln this 26th day of February, A. D. 1895.

[SEAL.]

E. BAKER, *Clerk D. C.*,
By W. W. KERLIN, *Deputy.*

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, Grace Waring, do hereby certify that A. P. S. Stuart and W. C. C-ooks were by me first severally duly sworn to testify the truth, the whole truth and nothing but the truth, and that the foregoing depositions were taken in shorthand and reduced to writing by myself at the time and place therein specified; that the signatures of said witnesses *was* waived by agreement of parties; that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit; that said depositions were taken before me in pursuance to the agreement therein set forth.

I further certify that Exhibits Nos. 1, 2, 3, 4, 5, and 6 (true, exact and perfect copies of which are hereto attached, marked Exhibits 1, 2, 3, 4, 5, & 6) were introduced in evidence in said cause during the taking of said deposition-.

Dated Omaha, March 1, 1895.

GRACE WARING.

Fees.

Per diem	$10 00
Mileage to Lincoln and return	5 50
Transcript, 355 fol's, at 20c	71 00
Swearing 2 witnesses	20
Filing 6 exhibits	60
Certificate	35
Paid by respondent, A. P. S. Stuart	$87 65

Attendance of witnesses:
W. C. Crooks, 1 day, 1 mile.

Upon the back of said testimony appear indorsements in the words and figures following, to wit:

69 "Q." Kent K. Hayden, receiver Capital National bank, complainant, *vs.* A. P. S. Stuart, respondent. Testimony for respondent. Filed Mar. 15, 1895. Elmer D. Frank, clerk.

106 Thereupon afterwards, to wit, on the 8th day of April, 1894, depositions on behalf of complainant were filed in said case; which said depositions are in the words and figures following, to wit:

* * * * * * *

In the Circuit Court of the United States, District of Nebraska.

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska, Complainant,
vs.
AMBROSE P. S. STUART, AUGUSTUS T. GRUETTER and CHARLES F. JOERS, Copartners as Gruetter & Joers, Respondents.

DEPOSITIONS.

Stipulation to Take Testimony.

It is hereby stipulated and agreed by and between the complainant and defendant, represented respectively by G. M. Lambertson and C. C. Flansburg, that the testimony in the above-entitled action, taken on behalf of the complainant, and such testimony as the respondent shall care to take before the present notary, may be taken in shorthand by and before E. J. Hedges, notary public, and when the notes are extended and signed by the respective witnesses the same shall be duly certified, transmitted to and filed with the clerk of the circuit court of the United States for the district of Nebraska, and shall have the same force and effect, subject to any objections made at the time such witness is examined, as depositions taken *de bene esse* under the statutes of the United States, and shall have the same force and effect as testimony taken by and before and reported and filed in court by a master or examiner in chancery.

In the Circuit Court of the United States, District of Nebraska.

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska, Complainant,
vs.
AMBROSE P. S. STUART *et al.*, Respondents.

It is hereby stipulated and agreed by and between the (cpunsel) for complainant and respondents in the above-entitled action that the time of taking and filing testimony therein may be and is hereby extended until the 9th day of April, A. D. 1895.

G. M. LAMBERTSON,
Attorney for Complainant.
C. C. FLANSBURG,
Attorney for Respondent-.

107 *Testimony for Complainant.*

KENT K. HAYDEN, of lawful age, being by me first duly cautioned, examined, and solemnly sworn, as hereinafter certified, testified as follows:

Questioned by Mr. LAMBERTSON:

Q. State your name, age, and present business.

A. Kent K. Hayden; age, 38; receiver of the Capital National Bank of Lincoln, Nebraska.

Q. In what business were you engaged prior to entering upon the duties of receiver of the Capital National bank?

A. In the banking business.

Q. And how long had you been in the banking business and what particular branches of the business were you engaged in? State fully.

A. I had been in the banking business about 23 years, starting as a messenger boy, book-keeper, teller, assistant cashier, and manager of a bank.

Q. In what kind of banks were you engaged in these various vocations?

A. National banks.

Q. State what official position prior to the present one you have held in connection with national banks and for what periods of time.

A. Cashier of the State National Bank of Lincoln for 8 years; assistant cashier of the Nebraska Bank of Omaha about 3 years; teller of the First National Bank of Omaha about 7 years, and I was national bank examiner for about one year.

Q. How long have you as receiver been in charge of the affairs of the Capital National bank?

A. Since June 1st, 1893.

Q. What was the date of the appointment?

A. May 24th, 1893. It took effect June 1st, 1893.

Q. You may state whether or not from your connection with the banking business and your knowledge of books and the accounts and entries in different banks made in the books you are and consider yourself an expert accountant.

A. I do.

Q. You may state, Mr. Hayden, whether you were directed at any time to make an assessment upon the stockholders and the capital stock of the Capital National bank; and if you answer yes, you may then produce the order of the comptroller to that effect.

A. An order for one hundred per cent. assessment was made upon the capital stock of the Capital National Bank of Lincoln by
108 the Comptroller of the Currency on the date of June 10th, 1893, and I produce a certified copy of the order.

Complainant offers in evidence the certified copy of the order of the comptroller produced and identified by witness, dated June 10th,

1893, directing an assessment on the shareholders of the Capital National Bank of Lincoln, Nebraska.

Respondent objects to the introduction of said order as immaterial.

Said certified copy is hereto attached and made a part hereof, marked Exhibit 1.

Q. Have you the custody of the stock books and the stubs of the stock books of the Capital National bank?

A. I have.

Q. Please introduce them. (Witness produces stock books.) Will you turn to entries in the stubs showing the issue and the date of the issue of any stock or shares of stock to the respondent, A. P. S. Stuart?

A. Yes, sir. (Witness turns to stub entries referred to.)

Complainant offers in evidence what purports to be the stub of certificate No. 36, for 100 shares of stock, issued to Mr. Stuart, of the date of November 1, 1884, and the stub of certificate 53, fifty shares, and dated July 1, 1886.

Respondent objects to this offer as immaterial and incompetent.

Certified copies of said stubs are hereto attached and made a part hereof, marked respectively Exhibit 2 and Exhibit 3.

Q. You may state if you know the handwriting in which these stubs to these certificates of stock are made out.

A. I do.

Q. You may state.

A. They are made out in the handwriting of C. W. Mosher.

Q. Who was C. W. Mosher?

A. He was the president of the bank.

Q. Now, you may state whether or not these certificates were at any time returned to the bank; and, if so, whether they are in the possession of the bank, and if they are you may produce them.

(*Q.*) Yes, sir; they were returned to the bank.

Q. On what date?

A. January 3rd, 1893. Both certificates were returned of that date.

Q. I will ask you if you are acquainted with the (handwriting) of what purports to be the signatures of the cashier and president on these certificates.

A. Yes, sir; I am.

109 Q. Whose signatures are signed to the certificates?

A. R. C. Outcalt, cashier, and C. W. Mosher, president.

Q. Are you acquainted with the signatures of what purports to be the cashier and president on the other certificate, No. 53?

A. Yes, sir.

Q. And whose signatures were there attached?

A. R. C. Outcalt, cashier, and C. W. Mosher, president.

Q. Are you acquainted with the signatures endorsed upon the back to that certificate?

A. I am.

Q. And acquainted with his handwriting?
A. Yes.
Q. And whose signature is it?
A. A. P. S. Stuart.
Q. And whose handwriting on the back of certificate No. 36?
A. A. P. S. Stuart.
Q. You know that to be his handwriting?
A. Yes, sir.
Q. In what kind of a book are those certificates?
A. In the stock-certificate book.
Q. Is that the same certificate book from which you read and which contains the stubs of the certificates of these shares of stock?
A. Yes, sir.

Complain-t offers in evidence certificate No. 36 for 100 shares of stock, bearing date the 1st of November, 1884, and certificate No. 53 for 50 shares of stock, bearing date the 1st day of July, 1886.

To which no objection is offered on the part of the respondent, and the same are hereto attached and made a part hereof, marked respectively Exhibit- 4 and 5.

Q. Have you the stock book in your custody or possession showing that shares of stock, in lieu of these, were issued to any one else?
A. Yes, sir.
Q. You may produce the stub of the certificate.
A. Here it is (producing it).

Complainant offers in evidence stub of certificate No. 153 for 50 shares of stock purporting to have been issued to Gruetter & Joers, of the date of January 3rd, 1893, and of certificate No. 154 for 50 shares of stock issued to Gruetter & Joers of the date, of January 3rd, 1893; also stub of certificate No. 155 for 50 shares of stock issued to Gruetter & Joers, dated January 3, 1893.

110 No objection is made to this offer, and the said stubs are hereto attached and made a part hereof, marked respectively Exhibit 6, Exhibit 7, and Exhibit 8.

Q. I will ask you whether any other shares of stock or any certificates of stock were ever made out and issued to Mr. Stuart, the respondent, than these put in evidence.
A. None that the books show.
Q. Now, was there any other transfer of shares of stock to any one subsequent to this date?
A. One other.
Q. One other?
A. On January 14, 1893.
Q. What was that?

Respondent objects to the question as incompetent, irrelevant, and immaterial.

A. Forty-five shares issued to C. W. Mosher.

Q. Have you, as receiver, the stock ledger?
A. Yes, sir.
Q. Will you produce it?
A. Yes, sir (producing ledger).

Complainant offers in evidence page 753 of Ledger No. 9 of the Capital National bank, for the purpose of showing the stock account of A. P. S. Stuart.

Respondent objects to this offer as incompetent.

Certified copy of said entry is hereto attached and made a part hereof, marked Exhibit 9.

Complainant also offers in evidence from the same book, page 799, showing the stock account of Gruetter & Joers.

Respondent objects to this offer also as incompetent.

A certified copy of said page is hereto attached and made a part hereof, marked Exhibit 10.

Q. Now, Mr. Hayden, what was the date that the bank closed its doors?
A. January 21st, 1893.
Q. You may state whether or not any notice of this assessmen- was ever given to the respondent, Mr. Stuart, and demand made for the payment thereof, and whether payment has ever been made?

Respondent objects as incompetent and calling for a conclusion.

A. Yes; notice in form as furnished by the comptroller was sent to Mr. Stewart by registered mail.
111 Q. Have you ever had any conversation with him personally about it?
A. No, sir.
Q. Have you the registry receipt acknowledging the receipt of this letter?
A. Yes, sir.
Q. You may produce it. (Witness produces registry receipt.) Do you know whose signature is attached to that?
A. Yes, sir.
Q. Whose is it?
A. Mr. Stuart's.
Q. The respondent in this action?
A. Yes, sir.

Complainant offers in evidence the registry receipt produced and identified by witness.

Respondent objects to this offer as incompetent, immaterial, and having no foundation laid.

Said registry receipt is hereto attached and made a part hereof, marked Exhibit 11.

Q. Have you the form of notice that you sent out to Mr. Stuart?
A. Yes, sir.
Q. You may produce it. (Witness produces paper.) Is that a copy of the order you sent to Mr. Stuart?

A. It is except as to being signed by me and addressed to Mr. A. P. S. Stuart.

Complainant offers in evidence what purports to be a copy of the notice sent to Mr. Stuart.

Respondent objects to the offer as immaterial and incompetent and no foundation being laid.

Said copy of notice is hereto attached and made a part hereof, marked Exhibit 12.

Q. Has this assessment been paid by Mr. Stuart?
A. No, sir, no part of it.
Q. Has it been paid by Gruetter & Joers?
A. No, sir.
Q. Nor by any one?
A. No, sir.
Q. Have you in your custody, as receiver of the Capital National bank, the record book of the directors and officers of the Capital National bank, showing the meeting and election of officers?
A. Yes, sir.
Q. You may produce the same.
A. Here it is (producing it).

112 Q. Turn to that part of the record showing the election of Mr. Stuart as a director of the Capital National bank. What is the record you hold in your hand, Mr. Hayden?

A. It is the record of the meetings of the stockholders and directors.

Q. I will ask you if you are acquainted with the handwriting of R. C. Outcalt, cashier and secretary of the bank, and C. W. Mosher, the president?

A. I am.

Q. I direct your attention to pages 36 and 37, what purports to be a special meeting of the directors held May 23, 1884, and you may state whose signatures are attached.

A. R. C. Outcalt, secretary of the board of directors, and C. W. Mosher, president.

Complainant offers in evidence on pages 36 and 37 of this record what purports to be a record of a special meeting held by the directors May 23, 1884.

Respondent objects to this offer as immaterial and incompetent.

A certified copy of said pages is hereto attached and made a part hereof, marked Exhibit 13.

Q. Now, you may turn to said record, to what purports to be the record of another meeting of the directors in which the respondent, A. P. S. Stuart, participated?

A. On page 40 is a record.

Complainant offers in evidence on page 40 of said record, what purports to be a record of a stockholders' meeting of the date of the second Tuesday in January, 1885; and also offers in evidence pages 41, 42, 43, 47, 50, 51, 52, 53, 54, 55, and on page 55, under date of

January 20, 1889, record of certificate signed by W. W. Holmes and A. P. S. Stuart.

Certified copies of said pages and of said record of certificate are hereto attached and made a part hereof, marked respectively Exhibits 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24.

Q. I will ask you if you are acquainted with the handwriting of the persons purporting to have signed this statement or certificate made January 20, 1889, and found on page 55?

A. I am.

Q. Whose signatures are attached?

A. W. W. Holmes and A. P. S. Stuart.

Complainant also offers from this record pages 56, 57, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69.

113 Certified copies of said pages offered by the complainant are hereto attached and made a part hereof, marked respectively Exhibits 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37.

Q. Are you acquainted with the handwriting of what purports to be a record of a meeting, written on one of the letter-heads of the bank, bearing date January 22, 1893, and pinned to page 69 of the record?

A. Yes, sir.

Q. In whose handwriting is the record and by whom is it signed?

A. C. W. Mosher, president of the bank.

Respondent objects to each and every offer made by the complainant of the pages of the book purporting to be, and labelled the record, for the reason that there is no foundation laid for the admission of the same, and for the reason that the same is incompetent and immaterial.

Respondent objects to the offer of the slip pinned in on page 55 of said record, on the ground that the same is incompetent, immaterial, and not properly authenticated and proved.

Respondent objects to all of the pages offered from 56 to 67 for the reason that the same were not authenticated nor attested by the secretary or any other person save the president.

Respondent objects to the pencil memorandum on the report pinned to page 69 for the reason that the same is immaterial and incompetent and there is no proper foundation laid for the introduction of the same, and the same is not authenticated and proved.

Q. As receiver of the bank have you made a schedule of the assets of the bank at the date of suspension?

A. Yes, sir.

Q. You may produce that schedule.

A. I have in my hands the schedule of assets of the bank at suspension.

Q. You may state what the sum total of the assets of the bank at the date of suspension were.

Respondent objects as immaterial and incompetent, as calling for a conclusion and as not the best evidence.

A. There were on hand bills receivable of the bank amounting to $519,600.00, and the books showed a record of other bills receivable not on hand amounting to $141,011.44. There was the sum of $15,385.87 in cash on hand.

114 Q. From what data or books did you make up this statement of assets?

A. The amount of bills receivable on hand is taken from the notes and bills receivable themselves, and the list of the same is handed you herewith.

Q. What does this list show? You may just produce it.

Respondent objects as incompetent and immaterial and not the best evidence.

A. It comprises the list of all the bills receivable on hand in possession of the bank.

Q. And from what do you say this is made up?

A. From the notes and bills themselves.

Q. On hand and in your custody?

A. On hand and in the custody of the receiver, amounting to $519,600.00.

Q. Now is this statement which you have here correct in every respect?

Respondent objects as immaterial and incompetent, and calling for a conclusion of the witness.

A. Yes, sir.

Complainant offers in evidence schedule of the bills receivable of the Capital National bank now in the hands of the receiver, and in possession of the bank at the date of its suspension.

Respondent objects to this offer as incompetent and not the best evidence.

A certified copy of said schedule is hereto attached and made a part hereof, marked Exhibit 38.

Q. Have you made a schedule of bills receivable which the books show and which are not on hand?

A. Yes, sir.

Q. Are these of the date of the suspension of the bank?

A. Yes, sir.

Q. Is this schedule correct?

Respondent objects to the question as incompetent and not the best evidence.

A. Yes, sir.

Q. How did you make the schedule, Mr. Hayden? Make a copy from the books?

A. Why, yes; entries that are made upon these records.

Q. Are they not made in one book?

A. Yes, sir.

115 Q. What is that book?

A. Record of bills receivable.

Q. I will ask you to produce the book showing the bills receivable of the Capital National bank at the date of its suspension, as you have testified, amounting to $141,011.44, but were not on hand.

A. I have the book (producing it).

Q. You may turn to the pages where these entries are. I will ask you to explain a little more fully, Mr. Hayden, how these entries are made upon which you have in your hand, how numerous they are, and how many pages they cover, and whether they are found on any one page or cover a number of pages, and the number of pages.

A. They cover a great many pages and are the bills receivable not being marked paid.

Q. What do you mean by that?

A. Well, that they are shown to be assets of the bank unpaid and uncollected. This book shows a great many items paid and collected, but notes and bills amounting to $141,011.44 have not been paid.

Q. At the date of the suspension of the bank?

A. At the date of the suspension.

Q. What is meant here—what do you mean by bills receivable shown by the books of the bank but not on hand?

A. I mean just that. They are not on hand. The record shows where some of them are and does not show where others are. A small amount of these covered here have been traced and possession obtained of them.

Q. Well, what knowledge have you that the bank owned these?

A. The amount of these notes and bills is included in its bills-receivable account and has been for a great many years.

Q. Well, is the bills-receivable account found in the book which you hold in your hands now?

A. Not the bills-receivable account, but the record of all the bills receivable is shown in this book.

Q. Are any of the bills receivable referred to in this schedule—have any of them been rediscounted?

A. None of them.

Q. Have you any of the original bills receivable covered by this schedule?

A. Yes, sir; I have a number of them.

Q. Why were they not included in the other schedule?

A. Because they were not on hand.

Q. Not on hand at the date of the suspension of the bank, you mean?

A. At the suspension.

Q. Have they been acquired since?

116 A. Yes, sir; some of them.

Complainant offers in evidence schedule of bills receivable amounting to $141,011.44, shown by the books of the bank but not on hand at the date of the suspension.

Respondent objects to this offer as incompetent, having no foun-

dation laid for the admission of the same, and as not the best evidence.

A certified copy of said schedule is hereto attached and made a part hereof, marked Exhibit 39.

Q. Mr. Hayden, have you examined the paper of the bank, and the bills receivable on hand at its suspension, and the bills receivable shown from the books of the bank, and have you investigated the solvency of the makers of those bills receivable, so as to testify and give an opinion as to the value or worthlessness of the paper and bills receivable and assets of the bank at the date of its suspension?

A. Yes, sir.

Q. You may state what, in your opinion, was the good, doubtful, and worthless paper, bills receivable and assets of the bank at the date of its suspension.

Respondent objects to the question as incompetent and calling for a conclusion of the witness, and as immaterial.

A. Of the bills receivable on hand at suspension, amounting to $519,600, I consider the sum of $58,596.82 as good; the sum of $141,391.27 as doubtful, and the sum of $319,611.91 as worthless. Of the bills receivable not on hand at suspension, amounting to $141,011.41, I considered all worthless with the exception of about $10,000.00.

Q. You may state upon what you base your opinion as to the value or lack of value of the bills receivable referred to.

Respondent objects as immaterial and no foundation laid for the same.

A. I base my opinion upon investigation and knowledge of the makers of the paper.

Q. State what amount has been collected upon the bills receivable since the suspension of the bank.

A. Pretty much all the good bills receivable have been collected.

Q. What attempts have been made to collect the doubtful ones?

A. Why, most of them have been sued, where it was thought advisable. Where they have not been sued, there have been demands made and notices sent out.

Q. Has execution been issued upon judgments obtained?

117 A. In some cases, where it was thought anything could be realized.

Q. You (*make*) take up some of the bills receivable, especially some larger amounts that you consider worthless?

Respondent objects as immaterial and incompetent, and having no foundation laid.

A. Among the worthless assets of the bank are notes against W. C. Outcalt who has been sued and judgment rendered for $58,091, and notes of C. W. Mosher which have been sued and judgment obtained for $84,294.48, and notes against Edwin W. Mosher, $97,658.85, which have been sued.

Q. Who is Edwin W. Mosher?

A. A brother of Charles W. Mosher, president of the bank.

Q. Have you investigated the financial standing and solvency of Edwin W. Mosher?

A. Yes, sir.

Q. You may state what in your opinion his solvency is, as ascertained by your investigations.

Respondent objects as incompetent, immaterial and no foundation laid.

A. From the best information I can obtain I consider him insolvent at this time. Now, among the assets which I consider worthless are notes signed Western Manufacturing Company, amounting to $125,000.00.

Q. Upon what facts do you base your opinion as to the insolvency of the makers of those notes?

A. My inability to collect a dollar of them.

Q. Well, is there any other reason?

A. Why the notes are executed by E. Hurlbut, Jr., in the name of the Western Manufacturing Company.

Q. Do you know whether there was such a company as the Western Manufacturing Company, of which E. Hurlbut, Jr., was manager? And if so, who composed that company, and state whether it had any property or assets so far as you have been able to learn?

A. So far as I have been able to learn the company which Hurlbut purported to be manager of had no property or assets of any kind, or business. There is an incorporated company here under the name of the Western Manufacturing Co., but they disclaim any connection with these notes.

Respondent moves to strike out the voluntary statement of the witness as to what the Western Manufacturing Company say in regard to these notes.

A. Who is manager of the Western Manufacturing Company you last referred to?

118 A. M. D. Welch is the secretary and treasurer.

Q. Were those notes executed by that company?

Respondent objects as not the best evidence and as incompetent and immaterial.

A. No, sir.

Q. Now are there any other of those bills receivable?

A. Yes, a note of F. A. Falkenburg for $2,041, I consider worthless; also note of M. C. Frank, $2,120, I consider worthless; also note of O. O. Heffner, $1,300.00 and note of C. W. Marsh, $3,600.00.

Q. What relation were the Marshes to the Moshers if you know whether they were any relation?

Respondent objects to the question as immaterial and incompetent.

A. I understand Mr. Marsh was Mr. Mosher's uncle. Also note of the Marsh Binder Manufacturing Company $9,000.00, I consider worthless; also note of Sycamore Marsh Harvester Company $4,500.00 I consider worthless; also note of W. A. Sharrar, $7,103,76; a note of C. E. Funk, $7,289.10, I consider worthless; also note of John M. Thayer, $2,228.43, I consider worthless.

Q. How do you know this note of John M. Thayer is worthless?

A. I asked him to pay it and he told me that he could not raise a dollar in the world, and that he could not pay it possibly. That he had no property to pay it out of.

Q. Have you made demands of these various persons, and if so, how frequently, for the payment of these bills receivable?

A. I have, except the larger part of the names I have mentioned have no existence. Of the $141,011.44 bills receivable not on hand but counted by the bank, notes amounting to $2,461.91 matured as long ago as 1886, and were unsecured, no interest being paid thereon. Notes amounting to 7,827.35 matured in 1887; notes amounting to $7,866.18 matured in 1888; notes amounting to $9,234.49 matured in 1889; notes amounting to $10,630.34 matured in 1890; notes amounting to $40,600.91 matured in 1891; notes amounting to $27,452.93 matured in 1892.

Q. You may state what amount of bills receivable of the bank have been (rediscounted) and indorsed by the bank and are outstanding, or the date of the suspension of the bank.

A. At that date notes were outstanding to the amount of $331,359.86. Of these notes all have been collected by the holders thereof except $143,139.30.

Q. You may state what the bank's liability is on that indorsed paper.

119 Respondent objects as calling for a conclusion, incompetent, and immaterial.

A. A very small amount of that paper amounting to $143,139.30 is good.

Q. State what the total liabilities of the bank were at the date of of its suspension.

Respondent objects as immaterial and no foundation laid.

A. At suspension the liabilites of the bank amounted to $1,463,013.17.

Q. What amount of those liabilities have been allowed by the receiver?

A. The claims allowed amount to $849,109.37.

Q. What is the amount of the claims not allowed?

Respondent objects as incompetent and no foundation laid.

A. $613,903.70.

Q. What amount of the claims not allowed has suit been commenced upon against you as receiver?

A. Suits have been commenced against the bank, and me as

receiver, on account of the bank's indorsement on notes amounting to $140,629.80.

Q. State, if you can, any large claim upon which suit has been commenced?

Respondent objects as immaterial and incompetent.

A. The claim of the treasurer of the State of Nebraska, which amounts to $236,361.83.

Q. What is the nature of that claim?

Respondent objects as immaterial and incompetent.

A. Why, the amount is shown due the State treasurer by a pass book in which the credit is shown, issued by the bank.

Q. For deposit?

A. Yes, sir; for deposit.

Q. State for what amount the receiver has allowed claims for certificates of deposit.

A. 356,149.49.

Q. What do the bank's books show due on certificates of deposit?

A. $86,265.70.

Q. How do you find out, or how do you know that the certificates outstanding exceed those on the book account?

A. By the certificates themselves being presented as claims authenticated and allowed.

Q. Do you know of any other certificates of deposit outstanding that do not appear upon the books of the bank and which you have not allowed as claims?

120 A. Yes; I know of one certificate amounting to $150,000.00 issued to J. E. Hill, treasurer, and turned over by him to J. S. Bartley, treasurer, and deposited in the bank by J. S. Bartley, treasurer, but which was never cancelled by the bank nor placed to Bartley's credit on the books of the bank, but entered in Bartley's bank book.

Q. You may state how the books were kept—you may state whether the books were manipulated.

A. The ac-ounts and the books were manipulated; for instance, the president of the bank, Mr. Mosher, would draw the stub of the certificate for a small sum and issue the certificate for a larger amount.

Q. Well, you may give an instance or instances where that was done.

A. The certificate of deposit register shows that No. 25097 was issued for $50.00 in the name of "collections" on August 17, 1891, while the certificate itself calls for $50,000.

Q. I will ask you in what book do you find this entry of $50.00?

A. In the certificate of deposit register.

Q. You have that certificate of deposit register here, have you?

A. Yes, sir.

Complainant offers in evidence from the book entitled Babbitt's certificate of deposit register, of the date of August 17, 1891, No. 25097 as entered in said book.

A copy of said entry is hereto attached and made a part hereof, marked Exhibit 40.

Q. Have you the certificate No. 25097?
A. Yes, sir (producing it).

Complainant offers in evidence certificate of deposit No. 25097 issued to J. E. Hill, treasurer, for $50,000, and asks the notary to make a copy of the same and attach to this deposition.

A certified copy of said certificate is hereto attached and made a part hereof, marked Exhibit 41.

It is agreed by and between the parties complainant and respondent herein, that certified copies of all exhibits may be attached to this testimony in place of the originals except that the original stock certificates shall be introduced and attached, such certified copies to be subject to objections heretofore and hereafter interposed.

Q. Now, are there any other certificates of deposit which the register shows?

121 A. The certificate of deposit register shows that certificate No. 25047 was issued for $975, in the name of "collections." The certificate itself calls for $37,975, issued to J. E. Hill, treasurer.

Complainant offers in evidence the entry in certificate of deposit register opposite No. 25047, and also offers the certificate of deposit itself, numbered 25047 issued to J. E. Hill, August 5, 1891, for $37,975.

Certified copies of said entry and of said certificate are hereto attached and made a part hereof, marked Exhibit 42.

A. (continued). The certificate of deposit register shows that certificate No. 24986 was issued to H. R. Krug for $1,000. The certificate itself calls for $7,000.

Complainant offers in evidence entry in the certificate of deposit register opposite No. 24986, and also certificate of that number, dated July 27, 1891, and payable to H. R. Krug.

Certified copies of said entry and of said certificate are hereto attached and made a part hereof, marked Exhibit 43.

A. (continued). The certificate of deposit register shows certificate No. 24981 was issued to A. P. S. Stuart for $20. The certificate itself calls for $2,000.00.

Complainant offers in evidence the entry in the certificate of deposit register opposite No. 24981, and also the certificate of deposit testified to by the witness, of the same number, dated July 27, 1891, payable to A. P. S. Stuart.

Certified copies of said entry and of said certificate are hereto attached and made a part hereof, marked Exhibit 44.

A. (continued). The certificate of deposit register shows that certificate No. 24941 was issued in the name of collections for $5,000.00. The certificate itself calls for $10,000.00.

Complainant offers in evidence the entry in the certificate of de-

posit register opposite No. 24941 and also the certificate of deposit of that number, payable to J. E. Hill, treasurer, for $10,000, dated July 20, 1891.

Certified copies of said entry and of said certificate are hereto attached and made a part hereof, marked Exhibit 45.

A. (continued). The certificate of deposit register shows certificate No. 25636 issued in the name of collections for $100. The certificate itself calls for $50,000.

122 Complainant offers in evidence entry in the certificate of deposit register opposite No. 25636, and also the certificate of that number, dated November 18, 1891, to J. E. Hill, treasurer.

Certified copies of said entry and of said certificate are hereto attached and made a part hereof, marked Exhibit 46.

Q. Mr. Hayden, have you examined the books of the bank to see whether or not any bad debts were charged off prior to February 2, 1892?

A. Yes, sir; I have.

Q. You may state whether there are any bad debts charged off during that period prior to February 2, 1892.

A. No, sir; none at all.

Q. Now you may state whether there were any bad debts during that period of time.

Respondent objects as calling for a conclusion of the witness, and incompetent.

A. Yes, sir.

Q. If there were any bad debts or losses prior to that time, state what they were.

Respondent objects as calling for a conclusion and as incompetent.

A. There was a loss by the failure of Donnell, Lawson and Simpson, bankers, New York city, $30,300.00.

Q. What date was that?

A. Dec. 28, 1885, $20,300 was charged to the account of the Chemical National bank, New York city; March 2, 1886, $5,000 was charged to the same bank; March 3, 1886, $5,300 was charged to the same bank; and three notes, numbered 90356, $10,200, were marked paid to offset these debits to the Chemical National bank.

Q. What was the basis of these charges against the Chemical National bank, if any?

Respondent objects as incompetent.

A. The charge against the account of the Chemical National bank was made to eliminate from the assets of the bank the notes of Donnell, Lawson & Simpson, which were of no value. There was no basis for the charge against the Chemical National bank. The Chemical National bank never credited any such amounts or sums to the Capital National bank.

Q. You may state whether or not these charges made against the Chemical National bank were true entries, and based upon some real item, or whether they were simply to cover up these losses.

123 Respondent objects as calling for a conclusion and as incompetent and leading.

A. They were simply made to cover up these losses.

Q. Now you say these charges against the account of the Chemical National bank seem to be based upon certain notes that were paid, which you have numbered. Were these notes in fact paid?

A. No, sir; they were just credited and the bills receivable account of the bank reduced that amount, and the amount due from the Chemical National bank increased upon the books of the Capital National bank.

Q. Are there any other losses? If so, state them,

A. Yes, sir; on May 21, 1892, the books of the Capital National bank show stocks and bonds as an asset to the amount of $46,103.61, and it is evident that the bank owned no stocks and bonds at that time.

Respondent moves to strike out the last answer of the witness as not responsive to the question, no foundation laid for its admission, and as incompetent.

Q. What do you mean when you say it is evident, in your last answer?

Respondent objects as having no foundation laid for its admission and as incompetent.

A. On the 15th day of June, 1892, this account—stocks & bonds—was eliminated as an asset by the warrant account being charged with $44,000 and the real estate account being charged with $2,103.61. This warrant account received a credit of $44,000 on May 21st, 1892, and the certificate account was charged with $50,000 by certificate No. 25636 being charged against it. This certificate was issued November 18, 1891, and the rediscount account was charged with the amount, $50,000, no funds being placed in the bank at the time this certificate was issued and the charge to the rediscount account being fictitious and false.

Q. In other words, Mr. Hayden, was that certificate issued to J. E. Hill?

A. Yes; the certificate was issued in the name of J. E. Hill, and the name of J. E. Hill was indorsed on the back of the certificate by Charles W. Mosher when it was charged to the certificate account.

Q. Have you that certificate?

A. Yes, sir.

Q. What amount does the certificate register show this certificate issued for?

Respondent objects as not the best evidence and as incompetent.

A. $100.00.

Q. Is this the certificate of deposit (showing witness certificate)?

A. Yes, sir.

Q. By whom was it signed?

Respondent objects as not the best evidence and as incompetent.

A. C. W. Mosher, president.

Q. And in whose handwriting is the certificate drawn up, if you know?

A. C. W. Mosher.

Q. An- whose name is indorsed on the back of it?

Respondent objects as not the best evidence and as incompetent.

A. J. E. Hill, treasurer.

Q. Are you acquainted with his signature—his handwriting?

A. Mr. Hill's?

Q. Yes.

A. Yes, sir; I am.

Q. Is this his handwriting?

A. No, sir.

Q. Whose handwriting is it?

A. C. W. Mosher.

Q. Will you produce the certificate register to show the entry of $100?

A. Yes, sir.

Q. Please produce it.

Witness produces register and shows entry as requested by counsel.

Q. Are there any losses, Mr. Hayden?

Respondent objects as incompetent and calling for a conclusion.

A. Yes, sir.

Q. You may state what they were.

A. July 2, 1883, the amount of $10,000 was deducted from the overdrawn collection account, and the same amount added to the amount due from the Omaha National bank.

Q. What did that show?

Respondent objects as calling for a conclusion and as incompetent.

A. It shows that the overdrawn collection account was a loss, and the loss was covered by charging the Omaha National
125 bank with $10,000, and there was no basis for making this charge except to cover up the $10,000 loss.

Q. Were there any other losses?

Respondent objects as calling for a conclusion, and as incompetent.

A. On December 14, 1885, the bills of exchange account was charged with $29,968.00 and the following notes were marked paid, and credited to the bills-receivable account.

No.	Name.	Amount.
10418.	Marsh Harvester Co.	$4,868 00
10461.	Marsh Binder Co.	5,000 00
10475.	Marsh Binder Co.	2,500 00
10502.	Marsh Binder Co.	2,500 00
10511.	Marsh Binder Co.	5,000 00
10519.	C. W. and W. W. Marsh	3,600 00
10525.	Sycamore Marsh Harvester Co.	2,000 00
10527.	Sycamore Marsh Harvester Co.	2,000 00
10529.	Marsh	2,500 00

making a total of $29,968.00.

Q. What do you know about those notes?

A. The notes were worthless—of no value.

Respondent objects to the answer as not responsive, immaterial, incompetent, and no foundation laid.

Q. How do you know that, Mr. Hayden?

Respondent objects as incompetent, immaterial.

A. From investigation, and the fact that all the makers of the notes are notoriously insolvent.

Respondent moves to strike out the answer of the witness to the last question, as incompetent and hearsay.

Q. Now, Mr. Hayden, are there any other losses? You may state in a general way whether there are any other losses or bad debts?

Respondent objects as incompetent, and calling for an opinion of the witness.

A. Yes, sir; the interest-paid account was $108,916.44 more than shown by the books.

Q. Describe or define the interest-paid account.

A. The interest-paid account represents the amount of interest paid by the bank or deposits, and for rediscounting its paper. At various dates this account was given credits in various sums, by the making of false entries or charges to other accounts, thereby showing it to be less than it really was.

126 Q. Now, have you a tabulated statement of the dates and amounts here?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Is that taken from the interest-paid account?

A. Yes, sir.

Q. Have you the book known as the interest-paid account?

A. Yes, sir.

Q. You may turn to what you think the first false entry on the interest-paid account.

Respondent objects to the question as assuming a state of facts not shown to exist, incompetent, no foundation laid, and leading.

A. This shows a credit December 29, 1884, of $813.00.

Complainant now offers in evidence the last line on page six, 6, of the interest-paid account; copy of which is hereto attached marked Exhibit 47.

To this the respondent objects as incompetent, and having no foundation laid for the same.

Complainant now offers on page 55 of the book called the interest-paid account the last line on that page; copy of which is hereto attached marked Exhibit 48.

Respondent objects to this offer as incompetent, and no foundation being laid for the same.

Complainant offers on page 58 of said interest-paid account the last line, June 9th, $1,500; a copy of which is hereto attached marked Exhibit 49.

Respondent objects as having no foundation laid, immaterial, and incompetent.

Complainant offers on page 65 of said interest-paid account the line opposite the date, November 16, interest-paid account in red ink, credit error of $2,500.00; copy of which is hereto attached marked Exhibit 50.

Respondent objects as having no foundation laid, immaterial and incompetent.

Complainant offers, on page 78, of the same book, the item opposite June 28, "paid warrants $10,000;" a copy of which is hereto attached marked Exhibit 51.

Respondent objects to the same as having no foundation laid, and as incompetent and immaterial.

127 Complainant offers on page 83 of the same book the line opposite Sept. 30, 1889, "paid costs on real estate $7,000.00;" copy of which is hereto attached marked Exhibit 52.

Respondent objects as having no foundation laid, incompetent, and immaterial.

Complainant offers on page 95 of the same book the line opposite March 19th, credit $5,000; copy of which is hereto attached marked Exhibit 53.

Complainant offers on page 98 of said book the line opposite May 16, 1890, credit on N. Y. $1,500; copy of which is hereto attached marked Exhibit 54.

Respondent objects as having no foundation laid, incompetent, and immaterial.

Complainant offers on page 99 of the same book the line opposite June 3, 1890, credit real estate $2,500.00; copy of which is hereto attached marked Exhibit 57.

Respondent objects as having no foundation laid, incompetent, and immaterial.

Complainant offers on page 98 of the same book line opposite May 19, 1890, credit Chic. $2,000; copy of which is hereto attached marked Exhibit 55.

Respondent objects as having no foundation laid, incompetent, and immaterial.

Complainant offers on page 98 of the same book line opposite May 21, 1890, credit N. Y. $1,500.00; copy of which is hereto at-ached marked Exhibit 56.

Respondent objects as no foundation being laid, incompetent, and immaterial.

Complainant offers on page 108 of the same book line opposite Sep. 25, credit by real estate account, $5,000.00; copy of which is hereto attached marked Exhibit 58.

Respondent objects as having no foundation laid, incompetent, and immaterial.

Complainant offers on page 115 of the same book line opposite Dec. 27, "$10,000, cr. S. & B. account;" copy of which is hereto attached marked Exhibit 59.

Respondent objects as having no foundation laid, incompetent, and immaterial.

Complainant offers on page 125 of same book line opposite $800 cr. prison contract; copy of which is hereto attached marked Exhibit 60.

128 Respondent objects as having no foundation laid, incompetent, and immaterial.

Complainant offers on page 127 of the same book line opposite 7,200, with just the word "cr.;" copy of which is hereto attached marked Exhibit 61.

Respondent objects as having no foundation laid, incompetent, and immaterial.

Complainant offers on page 131 of same book line opposite $10,000 in red ink cr. under date of June 20th; copy of which is hereto annexed marked Exhibit 62.

Respondent objects as having no foundation laid, incompetent, and immaterial.

Complainant offers on page 140 of same book line opposite $14,000, the word "cr.;" copy of which is hereto attached marked Exhibit 63.

Respondent objects as having no foundation laid, incompetent, and immaterial.

Complainant offers on page 151 of same book line in red opposite February 2nd, "balance $2,103.44;" copy (*copy*) of which is hereto attached marked Exhibit 64.

Respondent objects as having no foundation laid, incompetent, and immaterial.

Complainant offers on page 158 of same book line opposite $5,000, with words cr. by — York; copy of which is hereto attached marked Exhibit 65.

Respondent objects as having no foundation laid, incompetent, and immaterial.

Q. What is the effect and meaning of these entries?

Respondent objects as having no foundation laid, incompetent, and calling for a conclusion.

A. The effect of these entries was to make the interest-paid account

appear less than it was and to make the apparent profits of the bank more than they were and to make dividends.

Q. How do you know that these are not *bona fide* credits?

A. From the fact that the interest-paid account can only be offset or credited by profit and loss.

Q. How do you know, for instance, that that last credit was not a (*a*) valid *bona fide* credit?

A. The interest-paid account can only receive debits, as it shows the amount paid out by the bank, and when we figure up
129 the undivided earnings the interest-paid account is deducted from the interest received.

Q. Do these items which you have just given here indicate interest paid out by the bank on deposits and rediscounts or do they indicate interest paid to the bank on its bills receivable?

A. It does not indicate interest received by the bank; all interest received by the bank is credited to the interest account and not to the interest-paid account.

Q. Then these items here, if *bona fide*, would indicate that the bank had paid out that money itself to depositors or on rediscounts?

A. No, it would indicate that the bank had received that amount.

Q. Mr. Hayden, when the interest-paid account is debited that means that the bank had paid out the amount of that debit?

A. Yes, sir.

Q. And when the account is credited it means that the bank has received that much?

A. Yes, sir.

Q. And the bank has been credited to that amount?

A. Yes, sir.

Q. Now, have you a tabulated statement of these items which we have just given to the notary from the interest-paid account?

A. Yes, sir.

Q. Is that a correct statement taken from the books and covering all the items which we have given to the notary?

A. Yes, sir.

Complainant offers in evidence the tabulated statement of the items above introduced from the interest-paid account.

Respondent object- to this offer for the reason that there is no foundation laid for the same, and that it is incompetent and immaterial.

The statement offered is hereto attached marked Exhibit 66.

Q. Now, Mr. Hayden, do you know that the bank did not receive the money represented by these credits in the interest-paid account?

A. Because I find to offset these credits, debits to other accounts in a large number of the cases but not in all. In the cases where I do not find these debits, I am unable to tell what account or what entry was made to balance the credit.

130 Q. Mr. Hayden, as a book-keeper and from your general knowledge do you feel competent to state from an examination of these items, whether they were made at the time the other items in the book were made, or whether they were made subsequently?

A. They were made at or before the dates in the interest-paid account. The interest-paid account book shows that they were generally deducted from the amount of interest paid.

Q. Make an explanation as to how this account is made up.

A. The interest-paid account is intended only, and should only have debit entries to it, showing the amounts of interest paid by the bank.

Q. And where are these credits usually made, at the end of the footing or after the footings?

A. They are usually made at a convenient place for deducting the amount from the total of interest paid at the time the entry is made.

Q. Is there any other item of loss, Mr. Hayden, or steals, as exhibited by the books of the bank?

A. Yes, sir, I will mention one, an entry on December 24th, 1889, of $100,000 credit being added to the account of the State treasurer, J. E. Hill.

Q. What book is this, Mr. Hayden, (handing witness book)?

A. The individual balance book.

Q. What items are entered in the individual balance book?

A. Checks and deposits of all persons keeping accounts in the bank are represented by this book.

Q. Does this book show an account kept by the State treasurer with the bank?

A. It does.

Q. You may turn to Tuesday, December 24th, 1889, and state what was the balance on that day. State what the items are and what was his balance and what the credit was to his account that day.

Respondent objects to this as having no foundation laid, incompetent and immaterial.

A. The State treasurer had credits that date, $23,328.75 and another for $100,000.00; the entry of $100,000.00 threw the books out of balance to that extent.

Q. To the extent of $100,000.00?

A. Yes, sir.

Complainant now offers in evidence the line in the book identified as the individual balance book opposite the State treasurer, on December 24th, 1889.

131 Respondent objects as having no foundation laid and as incompetent.

A copy of the said entry is hereto attached, marked Exhibit 67.

Q. Mr. Hayden, what became of that $100,000.00, and how long was it carried that way upon the books?

A. It was carried until December 28, 1892. On that date C. W. Mosher put his notes into the bank, amounting to $40,833.34, and C. R. Outcalt put his notes into the bank, amounting to $29,166.66, and the check of Mosher & Outcalt was also put into the bank for

$30,000.00, making $100,000.00, and the false entry of December 24, 1889, was thereby accounted for.

Q. Did Mosher & Outcalt or either of them have any money to their credit at that time?

Respondent objects as not the best evidence and incompetent.

A. Yes, sir; on December 24, 1892, Mosher & Outcalt put their notes into the bank to the amount of $30,000.00 and credited the account of Mosher & Outcalt.

Q. What became of those notes, Mr. Hayden?

A. They are in the hands of the receiver of the Capital National bank as a part of the assets of said bank.

Q. Have they been paid, or either of them?

Respondent objects as not the best evidence, incompetent, and immaterial under the issue of this case.

A. No, sir.

Q. Have you made investigations as to their solvency or insolvency so as to be able to testify whether they are solvent or insolvent?

A. I have.

Respondent objects to the last question and answer for the reason that no foundation has been laid for the same and as incompetent and immaterial.

Q. You may state whether judgments are obtained against them.

A. Yes, sir; against both of them.

Q. Execution issued?

A. Yes, sir.

Q. Any property found?

Respondent objects as not the best evidence, incompetent, and immaterial.

A. No, sir.

132 Q. And you may state whether they are solvent or insolvent.

Respondent objects, as calling for a conclusion, incompetent, and immaterial.

A. They are insolvent.

Q. Are there any losses?

A. Yes, sir; April 25, 1891, the certificate of deposit account book was charged with $100,000.00 and a certificate was issued in the name of J. E. Hill, treasurer, for $100,250.00.

Q. What has become of that certificate?

A. The certificate was (canceled) April 28, 1891, and charged to the certificate account, and another certificate *account, and another certificate* issued for $75,000.00; April 30th, this certificate was cancelled and charged to the certificate account, and another certificate issued for $62,500.00; May 2, this certificate was cancelled and charged to the certificate account and another issued for $52,500.00; May 5th, this certificate was cancelled and charged to the certificate

of deposit account and another issued for $12,500.00; May 14th, this was cancelled and charged to the certificate account and another issued for $7,500.00; May 16, this certificate was cancelled and charged to the certificate ac-ount.

Q. What do these different items or entries in the book mean or indicate?

A. The amount was used by Mr. C. W. Mosher for his own use and benefit.

Q. What does the total amount to?

A. $100,250.00.

Q. Were those items ever made good to the bank?

A. No, sir.

Q. Mr. Hayden, you may state whether or not the surplus fund of the bank was charged off; and, if so, when and in what manner.

A. On February 2, 1892, $30,000.00 of the surplus was charged off, and bad debts to the amount of $21,402.46 were also charged off. Also at that time the difference between the $21,402.46 and the $30,000.00 was used to reduce the premium account, stocks and the bonds account, taxes account, wages account and interest-paid account.

Q. Have you a tabulated statement of the surplus that was charged off, and all the items used?

A. Yes, sir; I have.

Complainant offers in evidence the tabulated statement of the same, identified by the witness.

Respondent objects as no foundation has been laid, and as incompetent.

133 Said tabulated statement is attached to this deposition, and made a part hereof, marked Exhibit 68.

Q. Is that a correct statement?

A. Yes, sir; it is.

Q. Taken from the books of the bank?

A. Yes, sir.

Q. Mr. Hayden, you may state the sum total of notes discounted by the bank of the Western Manufacturing Co., signed and supposed to be signed by E. Hurlbut, Jr., manager of that company?

A. The books of the bank show notes of the Western Manufacturing Company to the amount of $755,000.00 that were discounted from July 25, 1888, to Jan. 21, 1893, inclusive.

Q. What became of those notes?

A. Notes to the amount of $110,000.00 were rediscounted by the Capital National bank with other banks, and the Capital National bank now hold- in the hands of the receiver, notes to the amount of $125,000.00.

Q. Making altogether how much?

A. $235,000.00 unpaid.

Q. What became of the other notes—the original notes?

A. Aside from the $235,00-.00?

Q. Yes.

A. Why, the books show the notes to have been paid, and I have no means of knowing what became of the notes.

Q. Have you a tabulated statement of these notes, taken from the books of the bank, with their dates and when they were paid?

A. Yes, sir.

Q. Is that a correct statement taken from the books of the bank?

A. Yes, sir.

Complainant now offers in evidence the statement showing list of these notes, with dates and when paid.

Respondent objects to this offer as incompetent and immaterial, and no foundation having been laid.

A copy of said tabulated statement is hereto attached and made a part of this deposition marked Exhibit 69.

Q. Who signed these notes, Mr. Hayden, so far as you know?

Respondent objects as not the best evidence, and as incompetent.

A. E. Hurlbut, Jr., manager.

134 Q. Who is E. Hurlbut, Junior?

Respondent objects as immaterial.

A. He was — person living in Lincoln, and in the employ of C. W. Mosher.

Q. Well, was there any such business for several years prior to the failure of the bank, as the Western Manufacturing Co., of which E. Hurlbut was manager?

Respondent objects as incompetent and having no foundation laid.

A. Not as far as I have been able to ascertain.

Q. And have you endeavored to find out, and learn, whether there was such a company?

A. Yes, sir.

(*A.*) And what is your best information and knowledge about it?

A. That there is no such company or concern.

Q. And that there was none at the time those notes were executed?

A. Yes.

Q. Now have you examined the account of the Western Manufacturing Company with E. Hurlbut, manager?

A. Yes, sir.

Q. Were the proceeds of those notes that were discounted passed to his credit or to the credit of the Western Manufacturing Company?

A. Yes, sir; I have only been able to find the proceeds of a few of the notes placed to the credit of the company.

Q. How many of these Western Manufacturing Company notes were put in during the last year?

A. $200,000.00 during the year 1892, and $25,000.00 during the month of January, 1893.

Q. Mr. Hayden, you may state whether or not, from your in-

vestigations, you are able to say whether their Western Manufacturing Company was a real company, or whether it was simply a fictitious company used by Mosher to cover up his stealings?

A. Mosher operated business at the State penitentiary under his name some nine or ten years ago, but about that time he sold the business to another concern, and since then, so far as I have been able to learn, the only business that the company had was in placing these notes.

Q. Was the Western Manufacturing Company that signed these notes by E. Hurlbut, Jr., manager, was it a corporation at all?

A. It was not a corporation.

135 Q. Mr. Hayden, you may state whether or not the books show that the directors returned dividends and paid dividends to the stockholders when the books of the bank showed that there were losses and were no earnings.

A. They did.

Q. Are you able to take up the books of the bank for the different years and point out the amount of losses and the amount of earnings, and have you made any statement to that effect? Have you made up any tabulated statement, so as to be able to testify accurately upon that amount?

A. The amount that I have already stated as being placed to the credit of the interest-paid account show losses to the extent of the credit so placed, and the paper I have testified to as being bad paper so shown by the books.

Q. You may state whether or not these other items which you testified to, where the $100,000.00 was dropped out of the balance, whether that would show a loss or not?

A. That entry would have shown a liability for $100,000.00 more than the bank had apparent assets to cover.

Q. Now, Mr. Hayden, have you in your possession the original statements that were made from time to time by the cashier and directors of the bank to the Comptroller of the Currency?

Respondent objects as leading, calling for a conclusion, and incompetent.

A. I have the office copies retained by the bank of the reports sent to the comptroller.

Q. Will you produce those?

A. Yes, sir.

Q. Where are the original reports?

A. In the hands of the Comptroller of the Currency.

Q. At Washington?

A. Yes, sir.

Q. All of these reports and papers which I have handed you, you received from the Comptroller of the Currency?

A. Yes, sir.

Q. To be used in other matters?

A. Yes, sir.

Q. And they are part of the records of the comptroller's office, are they?

A. Yes, sir.

Q. And your directions are as soon as you are through with them to return them to him?

A. Yes, sir.

Q. And you are not at liberty to allow the originals to go in evidence?

A. No, sir.

136 Q. Are you willing copies of the same shall be taken and attached to your deposition?

A. Yes, sir.

Q. What was the amount of overdrafts on the bank at the date of its suspension?

Respondent objects as not the best evidence.

A. $33,767.20.

Q. Can you give the amount of overdrafts at the date December 16, 1892?

A. Yes, sir.

Respondent objects as not the best evidence.

Q. What were they?

A. $15,023.85.

Q. When were the stocks transferred on the books of the bank?

A. January 3, 1893.

Q. What was the amount of the overdrafts on January 3rd?

A. $14,188.54.

Q. Now, Mr. Hayden, are you willing to produce all of these books from which statements have been made and from which you have testified and furnished data for the use of counsel for the respondent, and to open them to their inspection for their use on this trial?

A. Yes, sir.

Q. What was the amount of overdue paper of all kinds in the Capital National bank on the 3rd day of January, 1893?

A. $75,027.98; and the records also showed $106,094.11 overdue paper which should have been on hand, but was not.

Q. What do you mean by that which should have been on hand?

A. Well, just exactly that.

Q. Does this include overdue paper that had been rediscounted by the bank?

A. There was none overdue that had been rediscounted.

Q. Mr. Hayden, can you state whether there was any difference between the amount of the bills receivable as shown by the books and the amount actually turned over to the receiver; if so, state what the difference was.

A. Yes, sir; the amount of bills receivable turned over to the receiver was $332,280.07 less than the amount shown to be the bills receivable of the Capital National bank by its books.

Q. Do you know whether there was any difference between the

amount of certificates actually issued by the bank for moneys deposited and the amount of certificates as shown by the books of the bank?

137 Respondent objects as leading, incompetent, assuming facts of which there is no proof and no foundation laid.

A. Certificates of deposits have been presented to the receiver for an allowance of receiver's certificates to the amount of $511,149. The books of the bank showed certificates outstanding to the amount of $97,301.27.

Q. What is the difference?

Respondent objects as calling for a conclusion and incompetent.

A. $413,484.22.

Cross-examination.

By C. C. FLANSBURG:

Q. Mr. Hayden, how long have you been in the banking business?

A. About twenty-three years.

Q. I believe you testified upon your direct examination that you considered yourself an expert accountant?

A. Yes, sir.

Q. When were you appointed receiver of this bank?

A. In May, 1893.

Q. And when did you enter upon your duties as such receiver?

A. June 1, 1893.

Q. How long after you entered upon the duties of receiver before you discovered the various items, differences, shortages, mutilations, alterations and manipulations to which you have testified, as shown by the books, records, and investigations?

A. I have been looking the matters up from time to time from the time I was appointed and took charge until the present time.

Q. Now will you take the stock certificate book and tell me in whose handwriting are the certificates numbered 153, 154, and 155, dated January 3, 1893, to Gruetter & Joers, each for fifty shares of stock of the Capital National bank?

A. I am unable to say in whose handwriting the stubs are made up for 153 and 154, but the stub of 155 is made up in the handwriting of C. W. Mosher.

Q. And what relation did he sustain to that institution at that time?

A. He was president and director of the Capital National bank at that time.

Q. Now, take your stock ledger, Mr. Hayden. Will you turn to page 753 and tell we whose account you find on that page?

A. That of A. P. S. Stuart.

138 Q. And in whose handwriting are these entries, do you know?

A. Yes, sir.
Q. State whose they are.
A. I believe the entries are made in the handwriting of S. K. Hale.
Q. What position did he occupy with reference to this corporation?
A. He was book-keeper in the Capital National bank.
Q. Please turn to page 799 of the same record, Mr. Hayden?
A. I have it.
Q. Whose account do you find there?
A. Gruetter & Joers.
Q. Do you know in whose handwriting those entries appear?
A. I think I do.
Q. State whose.
A. Charles W. Mosher.
Q. I will ask you if you know whether the entries in that book are correct?
A. So far as relates to those certificates of stock.
Q. These particular entries so far as relates to these certificates of stock?
A. Yes, sir; I believe they are.
Q. You say that you mailed a notice of the call for the assessment upon the shares of stock to A. P. S. Stuart and Gruetter & Joers, both?
A. I do not think I said so. I would have to look and see.
Q. Did you mail a notice of the call for those assessments as made by the comptroller to Gruetter & Joers at the time you allege you sent the notice to Professor Stuart?
A. Yes, sir; I did.
Q. How was that notice sent?
A. By registered mail.
Q. Did you receive back a registry receipt at that time?
A. Yes, sir.
Q. Have you that?
A. Yes, sir.
Q. Will you produce it?

Respondent offers in evidence the registry receipt produced and identified by the witness, and asks the notary to attach the same to this deposition and make it a part hereof.

Complainant objects as not proper cross-examination, incompetent, and immaterial.

Said registry receipt is hereto attached, marked Exhibit 75.

Q. Now, take the record book of the bank, Mr. Hayden. What does this book purport to show?
139 A. The minutes of the meetings held by the directors and stockholders of the Capital National bank from time to time.
Q. Do you know when these entries were made; the entries in this book?
A. Well, I presume at the time when the dates——
Q. I asked you if you know.

A. No, sir.

Q. I believe you introduced pages 36 and 37 under date of May, 1884. I will ask you in whose handwriting that is?

A. I do not know in whose handwriting the minutes are made, I only know the signatures attached of the president and secretary.

Q. I will ask you if the name of the defendant Ambrose P. S. Stuart appears signed to that in any place of those pages?

A. Not signed to it.

Q. Turn to page 40 under date of January, 1885. Do you know in whose handwriting that is?

A. Not the minutes, only the signatures of the president and cashier.

Q. I will ask you if the name Ambrose P. S. Stuart appears signed to those minutes?

Complainant objects for the reason that the minutes show for themselves.

A. No, sir.

Q. Turn to pages 41, 42, 43, 47, 50, 51, 52, 53, 54.

A. Yes, sir.

Q. Would your answers be the same to all of these?

A. Yes, sir.

Q. Will you turn to page 55, Mr. Hayden?

A. Yes, sir.

Q. I will ask you if you know in whose handwriting those minutes are?

A. Yes, sir; I do.

Q. Whose handwriting is that?

A. C. W. Mosher.

Q. Is that record itself signed by the defendant Ambrose P. S. Stuart?

A. The record of the meeting is not signed by A. P. S. Stuart.

Q. The only signature of A. P. S. Stuart is to a report pinned or pasted in there, is it not?

A. Yes, sir; under date of January 20, 1889.

Q. Do you know who put that in or when it was put in?

A. No, sir.

Q. Pages 56, 57, 59, 60, 61, 62, 63, 64, 65, 66 and 67; do you know in whose handwriting those pages are?

140 A. Yes, sir; the handwriting of C. W. Mosher.

Q. Are those signed by any one else than C. W. Mosher—attested by any one?

A. Page 56 is signed by R. C. Outcalt, cashier; the other pages are only signed by C. W. Mosher, president.

Q. Do you know when those were entered there?

A. No, sir.

Q. On pages 69, January 22, 1893, is there any entry of record on that page?

A. None except the record pinned to the page by a pin.

Q. That is not signed by the defendant?

A. No, sir.

Q. You do not know as a matter of fact whether he h-d any notice of any of those transactions related or recited in that record?

A. Yes, sir; I know that he had notice of his election as director.

Q. You knew that?

A. Yes, sir.

Q. Of your own personal knowledge?

A. Yes, sir; in this way. I have seen his oath as director reported to the Comptroller of the Currency over his signature.

Q. Do you not know, so far as that record shows, whether he had any notice of those facts—do not know of your knowledge, that is, except what you have seen in that report? You say you do not know when those entries were made there?

A. No, sir.

Q. I understood you to say in your direct examination that in that schedule there were bills receivable $519,600.00 or about that?

A. Yes, sir; on hand.

Q. That the records show not on hand bills receivable to the amount of $141,011.44?

A. Yes, sir.

Q. Cash, $15,385.87?

A. Yes, sir.

Q. Now did the records show that these bills receivable $141,000.00 were not on hand—did the records itself show that, the bills-receivable record?

A. The record showed in whose hands they were in some instances, in other instances it was blank as to who held them, but they were not on hand.

Q. Now as to this $141,000.00 that was not on hand in the bank, how much have you been able to get possession of in the bank, or to reduce to cash since you have been receiver?

A. I would have to figure up just how much I have gained possession of. There has been a very small amount of it collected or paid.

141 Q. Do you know whether these bills receivable of the bank were good or bad at that time? I speak with regard to all bills receivable of the bank that came into your hands at the time they were taken.

A. I know that a large amount of them were bad.

Q. At the time they were taken?

A. At the time they were taken; yes, sir.

Q. Now will you specify which ones you know were bad at the time they were taken?

A. Yes, sir; the notes of R. C. Outcalt, amounting to $58,091.00.

Q. When was that taken?

A. They were taken a short time before the bank failed. I can give you the exact time if you would like it—24th and 28th days of December, 1892. E. W. Mosher, $107,085.45.

Q. And the date, please?

A. Well, now, those notes were taken at various dates.

Q. Was this paper (dates) prior to December, 1892?

A. Yes, sir.

Q. Do I understand you to say that at the time these notes were taken E. W. Mosher was not good? Of your own personal knowledge I mean.

A. I am giving you my opinion.

Q. I am asking you if you know at the time of the taking of them that he was not good?

A. I can only give you my judgment.

Q. Well, upon what do you base that judgment?

A. From my knowledge of Mr. Mosher and investigations of (*t*his) worth and his means.

Q. Made at what time?

A. Subsequent to the time of taking the notes by the bank.

Q. You made no investigations or inquiries at about the time these notes were taken?

A. No, sir.

Q. Do you not know what he was reputed to be worth at that time?

A. No, sir.

Q. Well, your next note.

A. C. W. Mosher, $83,333.34.

Q. What amount of this was taken subsequent to December 19, 1892?

A. $68,333.34.

Q. I will ask you if you know whether C. W. Mosher was considered good financially in December, 1893, if that was his general reputation?

A. I think he would have been considered good for a reasonable sum; that his general reputation would have warranted that conclusion.

142 Q. $20,000.00 or $25,000.00?

A. Perhaps to that extent.

Q. Your next note, please.

A. Western Manufacturing Co., $125,000.00.

Q. And what proportion of that was taken subsequent to December 16, 1892?

A. $55,000.00.

Q. I understand you to say that this paper made by the Western Manufacturing Co. was spurious paper; that (is), it was made by some one in the employ who signed the same, Western Manufacturing Co., by Hurlbut, Jr., manager?

A. Yes, sir.

Q. I will ask you if there was a Western Manufacturing Co. doing business here who were considered good at that time?

A. Yes, sir; there was.

Q. I will ask you how this paper was scheduled upon the bills receivable; that is, whether it showed who made it for the Western Manufacturing Co.?

A. Sometimes the record shows Western Manufacturing Co. and sometimes shows Western Manufacturing Co., E. Hurlbut, Jr., manager.

Q. What proportion of that $70,00-.00 in paper of the Western

Manufacturing Co. held by the bank and taken prior to December 16, 1892, disclosed upon the bills-receivable record that it was made by E. Hurlbut, Jr.?

A. $65,000.00.

Q. There was a Western Manufacturing Co. here at that time that was solvent or supposed to be?

A. Yes, sir.

Q. You base your estimate, then, as to the insolvency of the makers of these notes to which you have referred, upon their condition as you knew it when the notes were, or appeared to have been, discounted by the bank?

A. Not altogether.

Q. What proportion of the makers of these notes, then, to which you have referred, do you say were insolvent at the time they were discounted, or do you say that all of them were? I mean not only the notes you have mentioned, but all the notes to which you have referred.

A. I think all the paper that I have testified to as being worthless was worthless at the time the bank discounted the notes.

Q. And do you find in the records of the bank that these notes—many of them were renewals of other notes?

A. Yes, sir.

Q. Mr. Hayden, I will ask you if from the books of the bank you can trace these notes back to the original indebtedness?

143 A. Yes, sir; I think so in most cases at least. It may be difficult in some particular note, but as a general thing I can trace them back to the original entry.

Q. I will ask you how long it would probably take to trace back these notes where the renewals have been frequent.

A. That would depend on how many notes you want to trace back, it would probably take considerable time.

Q. Is it a fact that a number of these notes that you characterize as bad paper, represent a number of renewals of an original indebtedness running back to neraly the beginning of the bank?

A. Yes, sir; some of the paper would run back, if not to, almost to the beginning of the bank?

Q. Now, as to that paper, you would not be prepared to say whether or not the makers were good and solvent at the time of making of the original loan, would you?

A. I would not know as far back as the time the bank commenced business, as to the solvency of the makers of the paper.

Q. Now, the note of F. A. Falkenburg, do you know when that indebtedness which this represents had its inception?

A. No, sir; I do not.

Q. A renewal note, is it not?

A. Yes, sir.

Q. M. C. Frank, do you know when that indebtedness was incurred which that note represents?

A. No, sir; I do not.

Q. Was that a renewal note, do you know?

A. Yes, sir.

Q. O. O. Heffner, do you know when that indebtedness was incurred which the note represents?

A. Only about the time.

Q. Was that a renewal note?

A. Yes, sir; it was a renewal.

Q. C. W. and W. W. Marsh, do you know anaything about that indebtedness?

A. Yes, sir.

Q. Was that a renewal note?

A. Yes, sir; it had been renewed a good many times.

Q. That indebtedness was incurred at about the beginning of this corporation, was it not?

A. I believe it was.

Q. Do you know whether there was any security with that note at that time?

A. I do not know.

Q. Do you know whether the note was (collectable) at that time, from the security or otherwise?

144 A. I do not think it was, because I know that the Marshes failed just before the Capital National bank was started.

Q. Do you know whether the Capital National bank had any security out of which they could have made this at that time?

A. No, sir.

Q. Marsh Binder Manufacturing Co., do you know anything of that indebtedness?

A. The history of that is about the same as the other.

Q. That was a renewal note?

A. Yes, sir.

Q. And run over a long period of time?

A. Yes, sir.

Q. You do not know whether they had any security for that note out of which it could be collected?

A. No, sir.

Q. Sycamore Marsh Harvester Co.?

A. That is about the same.

Q. You do not know anything more about that than the others?

A. No, sir.

Q. W. A. Sharrar, what do you know about that indebtedness?

A. Well, it is an old matter.

Q. And this note represents the renewals, does it, the last renewal?

A. Yes, sir.

Q. Do you know whether Mr. Sharrar was solvent, and that note collectible from him at the time of incurring the indebtedness which it represents?

A. — do not think it was.

Q. You do not know what security they might have had at that time?

A. If they had security, it would be before.

Q. C. E. Turk, what do you know about that indebtedness?

A. It is an old matter.

Q. There have been several renewals culminating in the present note, have there?

A. Yes, sir.

Q. Do you know anything about his condition at the inception of that indebtedness?

A. No, sir.

Q. I understand you in your direct examination to say that at the time of the suspension of the bank, the total liabilities as shown by the books and records, amounted to $1,463,013.07?

A. I do not know that I said the books of the bank showed that.

145 Q. I said the books and records.

A. I said that the liabilities at the time the bank failed amounted to $1,463,013.07.

Q. How do you determine this, Mr. Hayden?

A. By claims presented to the receiver.

Q. Have claims amounting to $1,463,013.07 been allowed?

A. No, sir.

Q. What are the total liabilities so far as allowed?

A. $849,109.37.

Q. And what has become of the other $600,000.00 not allowed, had that been presented to you for allowance?

A. All of it with the exception of a few small deposits shown by the books.

Q. Have been presented?

A. Yes, sir.

Q. I understand you have only allowed $849,000.00?

A. Yes, sir.

Q. Why has not the $613,000.00 been allowed?

A. A large part of it is in litigation.

Q. Seeking to establish claims?

A. Yes, sir.

Q. So you do not know whether these are valid claims or not?

A. Only so far as my judgment goes.

Q. You are resisting the payment of them, are you not?

A. Yes, sir.

Q. Is a part of this liability the amount due the State treasurer as shown by the bank books of his pass book?

A. Yes, sir, nearly a quarter of a million dollars.

Q. And do the books of the bank show this as his pass book shows it?

A. No, sir.

Q. Do you know which of those books is correct of your own knowledge?

A. Yes, sir.

Q. Well, go on and state.

A. The State treasurer's pass book is correct so far as showing that he deposited certain certificates with the Capital National bank on receiving credit in his pass book in lieu of the certificates. The books of the Capital National bank also show that the certificates which the State treasurer deposited had been issued, but the amount

had not been placed to the State treasurer's account in open account, only a portion of it being so placed.

Q. From that I understand that in order to get the condition of the bank at any time, to ascertain the condition of any account, through the method adopted by Mosher and Outcalt in the
146 keeping of the books of the bank, it would have been necessary to have gone through all of the books to have determined the condition of the bank, would it not?

A. Yes, sir, to have determined the true condition.

Q. In other words, if any one had opened up the ledger showing the condition of the State treasurer's account, it would not have shown within $236,000.00 of what it was, would it?

A. Yes, sir, all of the certificates except $150,000.00 had been placed to his credit.

Q. It would not show within this $150,000.00?

A. That is right.

Q. You stated in your direct examination that the receiver has allowed claims to take up certificates of deposits issued by the bank, amounting to $356,649.49?

A. Yes, sir.

Q. And that the bank shows with regard to these certificates of deposit, that they only amounted to $86,000.00?

A. Yes, sir, $86,265.70.

Q. Now, Mr. Hayden, how would any one detect—how could any one from the bank books detect or determine that certificates of deposit in greater amount than shown by the bank's books were really in existence, or that in this case whereas the books of the bank show $86,265.70, there were really $356,149.49?

A. A list of certificates not marked paid taken from the certificate of deposit register ought to show the correct amount of certificates outstanding, and these ought to agree with the certificate account in the balance book of the bank?

Q. Just state whether it would in this instance.

A. I am unable to say whether it would or would not; I do not think it would, because the certificate of deposit register shows erasures and changes opposite the certificate on the register.

Q. Was there anything to show in the bank records that these certificates of deposit issued, amounted to more than $86,000.00?

A. Yes, sir.

Q. State what.

A. If all the certificates issued by the bank as shown by the stubs of the certificates had been listed, and all the certificates paid by the bank and shown to be in the possession of the bank had been subtracted from the total amount issued, there would have appeared more certificates outstanding than the books show.

Q. Do I understand you, that that was not done, and that no such account as that was kept? Am I correct in this?

147 A. No; the bank kept a certificate register, and also stubs of all certificates, and also kept a certificate account.

Q. Did this account show the true condition of affairs?

A. Not in one account; that account taken in connection with the other would have shown discrepancies.

Q. Now, as I understand it, the method of issuing those certificates was to make the stub for a small amount, the certificate for a larger amount, and make the certificate register agree with the stub itself in amount?

A. Yes, sir.

Q. Now, what further record did they keep of that certificate and how?

A. It was done in the manner you speak of sometimes, and sometimes it was not. For instance, the stub and record would not be changed so as to agree. In fact, many of the stubs have not been changed so as to agree. In fact, many of the stubs have not been changed at all, only the records.

Q. As I understand it, there was a part of those certificates issued, the stubs of which show, and the certificate register, that the amount issued was only $86,000.00, while in fact the certificates themselves were drawn for an amount in excess of this and equaled $356,000.00 in round numbers. Now, the certificate register and the stub were made to agree, were they not, as to the amount of which these were issued?

A. No, sir; only in some cases.

Q. I am referring now to those particular cases where those were issued.

A. Which particular cases?

Q. Those you have paid certificates on, that you have been testifying to, where you show $86,000.00 issued, when in fact, as far as the books show, the amount was $356,000.00?

A. $86,000.00 is shown by the balance book of the bank, which is the net amount outstanding, the amount being credited with deposits and charged when paid.

Q. I understand from you, Mr. Hayden, that there are a number of stubs of the certificates which show the amount for which the certificate of deposit was issued to be one small sum; that the certificate of deposit register tallied, so far as the amount was concerned, with the amount set forth in the stub of the certificate.

A. Yes, sir.

Q. So that as to the stub of the certificate and the certificate of deposit register, so far as those were concerned, there was no way of detecting the actual amount of the certificate until its return or presentation for payment?

A. That would be the case.

148 Q. Now, I understand that they kept another account—a certificate of deposit account in the ledger—a general certificate of deposit account.

A. It is only a balance-book account.

Q. They kept no separate account of the certificate of deposit account?

A. Except in the balance book.

Q. They did keep one there?

A. Yes, sir.

Q. Now, were the entries in that account taken from the certificate of deposit register or from the stub of the certificate, or were they made up from the certificate itself?

A. I do not know from where the book-keeper got his debits and credits to place on the balance book.

Q. Did that certificate of deposit account in the balance book contain the true amount set forth in the certificate of deposit in all instances, or did it sometimes contain the amount of the certificate of deposit as shown by the stub and the certificate of deposit register?

A. Sometimes the one and sometimes the other.

Q. So that the books themselves would not have disclosed and did not disclose the true condition of the certificate of deposit account?

A. They did not.

Q. Who issued the certificates of deposit amounting to $356,649.49 concerning which you have testified?

A. President, cashier, and teller.

Q. Do you know what proportion were issued by each of them?

A. No, sir; I do not.

Q. Do you know whether the cashier or the teller, either of them, made false entries upon the stub books or issued certificates of deposit for a larger amount than shown by the stub?

A. No, sir; I do not.

Q. All that were so issued by the president, C. W. Mosher?

A. Yes, sir; so far as I have discovered.

Q. I will ask you if you know, Mr. Hayden, whether the difference between $86,000.00 and the $356,649.49 represented the excess of issue or fraudulent issue by C. W. Mosher represented it all.

A. No, sir; there has been a certificate presented for which no claim has been allowed for $150,000.00, and there may be some few certificates outstanding yet that have not been presented.

Q. Is this the certificate of deposit to which you referred as having been issued to J. E. Hill, treasurer, and turned over by him to Mr. Bartley?

149 A. Yes, sir.

Q. What is the amount of excess in the certificates of deposit actually issued over the amount as shown by the stubs of the certificate book, if you know?

A. I do not know that.

Q. Can you tell?

A. I have no idea; I do not think it could hardly be arrived at now, because I do not know that even all the stubs could be found, and if they were, we also would have to find all returned and paid certificates and deduct the paid certificates from the total amount as shown by the stubs. Even this would not show the true state of the account, as the certificate register was changed by the word paid being put opposite certificates which were really not paid, reducing the apparent number of certificates outstanding quite an amount.

Q. By whom were these books manipulated, do you know?

A. C. W. Mosher.

Q. Do you know how further they were manipulated than what you have already testified to?

A. Do you mean the certificate account?

Q. Yes, sir; the certificate account.

A. Mosher would charge the certificate account without any certificates being paid, simply by putting in a slip reducing the certificate account and using the amount for other purposes, and then marking up enough certificates paid to have the account agree with the register.

A. That was in addition to the method you have already explained of making a small stub and large certificate?

A. Yes, sir.

Q. And to which you testified in your direct examination?

A. Yes, sir.

Q. Now, by examining the stubs of the certificate of deposit books and the certificate of deposit register, would this be apparent to any one that these had been manipulated?

A. Yes, sir.

Q. It would be apparent?

A. Yes, sir; because he did not always change the stub and the register in respect to the same certificate.

Q. Just mark them indiscriminately?

A. Yes, sir.

Q. So you have taken a comparison in that way in order to determine it?

A. Yes, sir; that would have determined it.

Q. You testified yesterday in your examination to a number of losses and bad debts charged off and the method of Mosher in manipulating these?

A. Yes, sir.

150 Q. How would it be possible to detect that without an examination of all these accounts?

A. It would not require an examination of all the accounts; for instance, if Mosher had charged the Chemical National Bank of New York with a false amount, an examination of the statement rendered by the Chemical National bank to the Capital National bank and checked up properly would have disclosed the discrepancy.

Q. It would have taken some one familiar with the banking business to know where to go to detect these discrepancies, would it not?

A. Yes, sir.

Q. These bad debts you testified being charged off, do you know whether they were in fact paid to Mosher or not?

A. I think they were. I do not know.

Q. I understand that you say there was a change May 21, 1892, to stocks and bonds as assets of about $46,000.00, and it was evident at that time that the bank owned no stocks. Upon what do you base that, Mr. Hayden? You could not tell from Mosher's bookkeeping whether they had any or not?

A. Because he eliminated the account by a false entry. It is pos-

sible they might have had the stocks and bonds, but if they did Mosher appropriated them to his own use.

Q. And simply made a false entry for the purpose of covering up his appropriation?

A. Yes, sir.

Q. Now you had a certificate of deposit here yesterday upon which you testified was issued in the name of J. E. Hill and signed upon the back of it J. E. Hill in a handwriting which you said was C. W. Mosher's?

A. Yes, sir.

Q. Do you know whether Hill ever authorized Mosher to write his name on that or not?

A. No, sir.

Q. Now, in regard to this interest-paid account to which you testified yesterday; as I understand that now, Mr. Hayden, the interest account was kept in two books?

A. Yes, sir.

Q. One was an interest paid, the other interest-received account?

A. One was an interest-received account, but the word received was not used. That account was called the interest received—was called discount, interest and exchange, and represented the receipts of interest and exchange of the bank.

Q. Now by that, all the credits have appeared that you testified yesterday to having appeared in the interest-paid account,
151 should they not? That book is all credits, is it not, so far as the interest account is concerned?

A. Yes, sir, but the credits I spoke of yesterday ought not to go onto that account.

Q. Well, all credits, all interest credits should go upon that account, should they not?

A. Yes, sir.

Q. So that it was an unusual thing for the credits to appear upon this interest-paid account?

A. Yes, sir.

Q. Now, I understand you to say yesterday in your direct examination that there were no credits or that the debits—the interest paid exceeded the other account so that there were no profits upon which to base a dividend. Is that correct?

A. I said if the credits to the interest-paid account had not been made, there would not have been sufficient earnings to make a dividend.

Q. Do you know what the interest-received account or discount account would show as to the interest received, the credits?

A. I do not know without looking it up.

Q. Will you look that up?

A. For how long a period?

Q. The same period that you covered yesterday.

A. Yes, sir.

Q. I understand you to say yesterday without these credits there was not interest enough to warrant them in declaring a dividend?

A. That is right.

Q. I want to see what interest was received. They charged interest paid with certain payments?

A. Yes, sir.

Q. I want to show what the interest received was as well as interest paid.

A. The discount, interest, and exchange account amounted December 31, 1894, to $31,956 85
June 30, 1885, it amounted to..... 28,451 97
December 31, 1885, it amounted to 35,693 37
June 30, 1886, it amounted to..... 36,434 36
December 31, 1886, it amounted to..... 37,601 08
June 30, 1887, it amounted to..... 39,946 64
December 31, 1887, it amounted to..... 42,700 74
June 30, 1888, it amounted to..... 38,240 90
December 31, 1888, it amounted to..... 42,082 82
June 30, 1889, it amounted to..... 39,770 89
December 31, 1889, it amounted to 38,807 51
June 30, 1890, it amounted to..... 34,751 76
December 31, 1890, it amounted to..... 35,650 55
152 June 30, 1891, it amounted to..... 37,878 65
December 31, 1891, it amounted to..... 31,415 06
June 30, 1892, it amounted to..... 31,038 30

Q. You testified yesterday that the certificate of deposit account shows a certificate April 15, 1891, for $100,000.00. Do I understand you that the certificate was actually issued to Hill at that time for $100,000.00?

A. No, sir, I do not think it was ever issued to Hill, only in his name.

Q. This certificate was afterwards cancelled in April, 1891. Was there a certificate issued or only the books of the bank show it?

A. A certificate was issued.

Q. Was actually issued?

A. Yes, sir, as stated.

Q. Yesterday, in your direct examination, Mr. Hayden, I think you stated that the books show that the directors returned and ordered dividends, when the books and records in fact show losses and no earnings. Will you tell what books disclose this, and how much of an examination it would have required to discover this?

A. Particularly the interest-paid account book would have shown a much larger sum paid out on account of interest than the amount reported to the board of directors by the cashier or president. A slight examination of that book would have shown the false credits before spoken of. And also an examination of the bills-receivable book would have shown bad debts as designated by the Revised Statutes overdue and unsecured, interest unpaid and not in course of collection, which ought, under the national banking laws, to have been charged off before a dividend was declared.

Q. You could not say that a bank was solvent because the paper was past due, would you, Mr. Hayden?

A. No, sir.

Q. You state, Mr. Hayden, that you sent a notice to Gruetter & Joers?

A. Yes, sir.

Q. Do you know what business they are in or were at that time?

A. In the furniture business.

Q. Do you know whether they are still engaged in that business?

Complainant objects to the question as not proper cross-examination.

A. I believe they are.

Q. I will ask you if your books disclose that at the time of the transfer of this stock from the defendant herein, Ambrose
153 P. S. Stuart to Gruetter & Joers, there was also surrendered to this bank three certificates of deposit, one for 5,000.00 and two for $2,000.00 each, duly issued to the defendant Ambrose P. S. Stuart by the said bank, and indorsed by him to Gruetter & Joers?

A. The certificates you mention were paid.

Q. Will you make and attach copies of these certificates to your deposition, and make them a part of the same?

A. Yes, sir.

Copies of said certificates are hereto attached and made a part of this deposition, marked Exhibit- 76, 77, 78.

Redirect examination.

By G. M. LAMBERTSON:

Q. Mr. Hayden, you say on cross-examination that $68,000.00 of the Mosher notes were put in after December 16, 1892. How many were put in after January 3, 1893?

A. None of them.

Q. How many were put in between December 16, 1892, and January 3, 1893?

A. $68,333.34.

Q. You say in your testimony that there was $55,000.00 of the Western Manufacturing Co.'s notes put in aafter December 16, 1892. How many of them were put in after January 3, 1893?

A. $40,000.00.

Q. Mr. Hayden, is it not true that there were sufficient erasures in the certified register to have attracted attention if the same had been examined?

Respondent objects as calling for a conclusion and as incompetent and immaterial.

A. Yes, sir.

Q. Did I understand you to say that the stubs and the register always corresponded, or did I understand you to say that sometimes they were different?

A. Sometimes they were different.

KENT K. HAYDEN.

Complainant now offers in evidence a certified copy of a warranty deed from Ambrose P. S. Stuart and wife to Charles Holland, dated and filed for record in the office of the register of deeds of Lancaster county, Nebraska, on the 5th day of December, A. D. 1893.

154 Respondents object to this offer as incompetent, immaterial and no proper foundation having been laid.

Said certified copy of deed is hereto attached and made a part of this deposition, marked Exhibit 79.

Complainant also offers in evidence a certified copy of a general power of attorney from Charles Holland to Ambrose P. S. Stuart bearing date the 1st day of December, 1892, and filed for record on the 27th day of December, A. D. 1882.

Respondent objects to this offer as incompetent, immaterial and no proper foundation having been laid.

Said certified copy of power of attorney is hereto attached and made a part of these depositions, marked Exhibit 80.

DEBORAH G. KING, being by me first duly examined, cautioned, and solemnly sworn, testified as follows:

Questioned by Mr. LAMBERTSON:

Q. What is your full name, Mrs. King?
A. Deborah G. King.
Q. You reside in the city of Lincoln?
A. I do.
Q. How long have you lived here?
A. 23 years in October, last October.
Q. And what is your husband's name?
A. Doctor S. H. King.
Q. Were you stockholders in the Capital National bank?
A. I am glad to say we were not.
Q. Were you depositors in that bank?
A. We were, sir.
Q. How much money did you have on deposit when the bank failed?

Respondent objects as not the best evidence, and as immaterial and incompetent.

A. $26,105.80 the morning of the closing of the bank.
Q. Were you acquainted with Mr. A. P. S. Stuart, the respondent in this action?
A. Oh, yes.
Q. How long have you known him?
A. I don't know, I think about 19 years—since when the first came here, before he brought his wife.
Q. You have known him then, about 19 years?
A. Yes, sir; about that time.
Q. Did you have any conversation with him on the morning of the failure of the bank?

A. Yes, sir; I did.

155 Q. Where?

A. At his house.

Q. Who was present there at that time?

A. Well, his wife was present part of the time and part of the time no one but him in the room. May I state the conversation I had with him?

Q. Yes; go on and state.

A. I had been up all night with an invalid brother, and I took up the Morning Journal and noticed that the Capital National bank had closed its doors, and I at once repaired to my husband's room and quietly awakened him. This was not far from six o'clock in the morning, and after talking with him a little while he dressed himself and came down. We were very much shocked, as we never heard of anything wrong with the bank, and I went downstairs, and he soon followed, and we talked over what was best to be done, and he says, I will go on and see Mosher and you see Professor Stuart, and let us find out what about this bank; it was not quite daylight yet, it was quite dark. I should judge it was about 7 o'clock, and I put on my wraps and repaired to Professor Stuart's home. Mrs. Stuart was in bed, and she got up and came to the door and asked what the matter was. I said, Good Lord, what does this mean about the bank having failed? She said, Is that the Capital National bank? I said, Yes. She said, Where did you get it from? I said, From the Journal. She said, I will call the Professor, and I said, Go and see the Professor and see what is the matter with the bank. I think she stepped into another room and called him as though he was in the chamber or another room at least. He came in and I asked him what was the matter with the bank. She said, Now you tell the Professor, and she stepped into her room off of the office of sitting-room or whatever it was called, and the Professor sat down and told me what he knew about the bank. I told him the Doctor had sent me there for him to tell me all about the bank, what the condition had been and if there was anything wrong, and he sat down and in his good, quiet way told me he did not like the way the bank had been doing for a long time. He said he did not like their going into the Western Manufacturing Company business, and he said he had a talk with Mr. Mosher about it, and he said he did not like the Arkansas business, and I asked him what that was, and he said it was a stave business, and he said he did not know of any loss of money in it, but he did not like it, and he said from that they went into the skating-rink business, and he said then he felt mad, and he said this is not banking, and I told them so, and then he said, when they went into the base-ball business I said it must be stopped;

156 that we must stop that and do a banking business, and not run after these outside affairs, and as near as I can give it he said they were mad, but he told them if they did not stop that kind of business he would get out.

Q. Who do you mean by them?

A. Mosher and Outcalt, and he said one of them swore very badly and used very bad language, and he said particularly Mosher, and

at this time I said the Doctor has gone to see Mosher about it, and he said if he has not gone you tell him to go to Outcalt, because he can get the truth out of Outcalt better than Mosher. And I said, Professor, what is the condition of the bank? Why was it closed? He says I have known for quite a while they had some bad debts such as very poor paper there, amounting to about $136,000.00, and he says, I did not like the way they were doing. They could not do outside business and that too, and I did not like it. And of course anybody who knows Professor Stuart knows that would not be the way of his doing business, and he said he was in hopes they would tide it over, and he said they had some very poor paper, and he spoke of some land in a different county, and at that Mrs. Stuart came in and he says you know I have sold out—which I had not known—and he said, Well, he had traded his stock for the Gruetter building a short time before. At this juncture Mrs. Stuart came into the room and she says, "It don't let you out fr[illegible] being responsible, does it? How long has it been?" Oh, no, he says, and then he spoke about the board of directors——

Respondent objects to the testimony being given by the witness, and moves to strike the same out as immaterial and incompetent, and as relating facts occurring long after the severance of this respondent with the Capital National bank and objects to the declaration of this witness as to what was said at that time as hearsay, and as incompetent and immaterial.

Q. You may state any further conversation you had with the respondent, Mr. Stuart, that morning, relative to the failure of the bank, and its condition.

Respondent objects to the question as incompetent and immaterial.

A. He went on and told me about it, he said he had not liked the management of the bank, and felt anxious about it; and I asked him how long, and he said a long time, and he went on and repeated again what he said before about going off into side business and said he did not like their not being able to declare a dividend, and I asked him this question. If——

157 Respondent objects to the witness taking a declaration made by this party at that time as incompetent, immaterial and hearsay.

A. (continued). I asked him why the bank was not closed in the condition it was, and asked him if he did not know that the bank's capital was impaired, and he said that it was; still he did not know he said about having the bank closed. And I said if the bank had been closed we could have gotten something out of the bank, and he said he was in hopes they could tide it over and Mrs. Stuart says, Professor, you did not expect this so soon——

Respondent objects to any statements made by Mrs. Stuart as incompetent and hearsay.

A. (continued). Why no, he says I did not.

Cross-examination.

By Mr. FLANSBURG:

Q. You say the Professor said that the first thing he objected to was going into the Western Manufacturing Company?
A. I think that was the first thing he objected to.
Q. And he was talking about Mosher and Outcalt?
A. He was talking about them; yes, sir.
Q. And he objected to their going into the Western Manufacturing Company?
A. Yes, sir.
Q. And he objected to the Arkansas business—the stave business?
A. He said he did not like it.
Q. Then he objected to Mosher and Outcalt going into the skating-rink business?
A. Mr. Mosher.
Q. He objected to Mr. Mosher going into the skating-rink business?
A. Yes, sir.
Q. Then he objected to Mosher and Outcalt going into the base-ball business?
A. Mr. Mosher went into the base-ball business.
Q. And he said that must be stopped because it was not banking?
A. Yes, sir.
Q. Do you know what positions they occupied in the bank?
A. Yes, sir.
Q. President and cashier, were they?
A. Yes, sir.
158 Q. Of the Capital National bank?
A. Yes, sir.
Q. The Professor objected to their running around with business that belonged to the skating rink, and buying lumber, and the Western Manufacturing Company while they were trying to run the bank?
A. That is what he said.
Q. And he said they had bad paper?
A. Yes, sir.
Q. And bad real estate?
A. Some poor real estate, he said.
Q. And therefore they were not able to declare a dividend?
A. He did not say therefore. He said he did not like it because they did not feel that they could declare a dividend.
Q. Did he say that was the reason he had sold out?
A. He said he did not like the way they were doing the business.
Q. He said there were too many side issues?
A. He said there was too much outside business and he did not like that.
Q. He did not like that?
A. No, he said that was not banking.

Q. And for that reason he wanted to get out?
A. Yes, sir.
Q. Did he say that the capital of the bank had been impaired?
A. He said he did not know.
—. ——.
A. He did not say he did not know, he said he thought it was.
Q. He was giving you an opinion, was he?
A. I think that was what he was doing.
Q. Did he give you any reason for that opinion?
A. I simply asked him the question.
Q. And he said it was?
A. Yes, sir.
Q. I understood you to say in your direct examination that he said he did not know as the capital of the bank was impaired, but he thought it was.
A. No, sir; he did not say that.
Q. You are positive of that, are you, that you did not say that?
A. I said he did not say——
Q. Answer the question.
A. You did not ask the question as I gave it. I asked him if the capital of the bank was impaired and he said he thought it was.

Q. I understood you to say in your direct examination that
159 in your conversation with Professor Stuart he said that he did not know as the capital of the bank was impaired but he thought it was?

A. He did not say any such thing, and I never said any such thing.
Q. You are positive of that, that you never said that in your direct examination, are you?
A. Said what?
Q. What I have asked you?
A. That Professor Stuart said that he did not know whether it was or not?
Q. Yes.
A. Yes, sir; he said he thought it was impaired.
Q. You are just as positive of that fact as you are of anything else you have sworn to, are you?
A. I am positive of it, sir.
Q. Just as positive as you are of anything else you have sworn to?
A. Yes, sir; I am.
Q. That he said the capital was impaired?
A. Yes, sir; he said he thought it was impaired.
Q. You are just as positive of that as anything else, are you, that you have sworn to?
A. I think so.

DEBORAH G. KING.

(Witness excused.)

HENRY GERNER, being by me first duly cautioned, examined and solemnly sworn as hereinafter certified, testified as follows:

Questioned by Mr. LAMBERTSON:

Q. What is your full name?
A. Henry Gerner.
Q. Where do you reside?
A. In Lincoln, Nebraska.
Q. And how long have you resided in Lincoln?
A. This coming spring it will be 24 years since I located here.
Q. And what has been your business?
A. The insurance business. I have followed that nearly 30 years.
Q. Are you acquainted with the respondent in this case, Mr. A. P. S. Stuart?
A. Yes, sir.
Q. Were you acquainted with C. W. Mosher and Richard Outcalt?
A. Yes, sir.
Q. Did you have any connection or hold any stock in the Capital National Bank of Lincoln, Nebraska?

160 Respondent object- as not the best evidence, incompetent and immaterial.

A. Yes, sir; I purchased some stock in the Capital National bank.
Q. About what time?

Respondent object- as not the best evidence, incompetent and immaterial.

A. In 1887, the summer of 1887 I purchased 50 shares of stock from Mr. Charles C. Hammond, and two years after, in 1889, I purchased another 50 shares of stock from Henry E. Lewis.
Q. So how many shares did you hold at the date of the suspension of the bank?
A. 100 shares.
Q. Do you remember the date the bank closed its doors?
A. Yes, sir.
Q. What date was that?
A. Well, the bank closed its doors on Saturday evening, the 18th or 19th of January, and on Sunday they held a meeting, a special meeting in the bank at which I happened to be present, and it was decided then that we should not open the doors any more—that we could not open.

Respondents move- to strike out the answer of the witness as not responsive to the question and as voluntary on the part of the witness.

Q. So that after closing its doors on Saturday it did not open its doors on the Monday following?
A. No.
Q. That was in 1892, was it?

A. No, sir; that was 1893, in January, 1893, two years ago.

Q. Do you know what official position the respondents, A. P. S. Stuart, held in that bank, if any?

Respondent object- as incompetent and immaterial and not the best evidence.

A. Yes, sir.

Q. What position did he hold?

Respondent objects as incompetent, immaterial and not the best evidence.

A. Director and chairman of the finance committee.

Q. Did you have any conversation with the respondent, A. P. S. Stuart, as to the proposed sale of his stock to Gruetter & Joers shortly before the failure of the bank?

A. Well, yes, some three months I should say.

161 Respondent objects to the witness making any voluntary statements, the question having been answered.

Q. You may state what that conversation was.

Respondent object- as incompetent, immaterial and not the best evidence.

A. Well, one afternoon I met the Professor, which was an almost daily occurrence, if I did not see him in the bank I met him on the street, and we passed the compliments of the day and some remarks, and one day, in one of our conversations and talks he told me that he was contemplating making a real estate deal, I said "yes," "yes," he says he had a proposition made him to purchase the Gruetter block down here, and it was a trade, and he said if he made the trade at all, it would be trading his bank stock and some money and assuming their liabilities, their obligations, a mortgage on the building for $30,000.00. I told him I thought it was rather an exorbitant price for the property, that I did not consider the bu-lding worth any such money, to which he responded that they were going to make a very good lease, they would take it for ten years—a ten years' lease on the premises at a rental of $6,000.00 a year. I told him I did not think it was possible for those men in the business to pay any such rent, it was too risky. Well, the Professor replied, we have to take some risk. Well, I said, I should rather, if I was in your place hold my stock and my interest in the bank. I think it is better or safer. He said he did not like the way they were doing business, he did not like the style, and a large share of the bank's capital was tied up in real estate and there was no prospect of dividends, and he preferred to do his own business and manage his own affairs. That is all there was to that conversation.

Q. Did you have any subsequent conversation with him about the matter?

A. Well, yes. I guess it was after he made the trade, either he told me about it or I took occasion to remark, I see you made that trade, Professor. Yes, he says, I did; he says, as I told you before

I don't like Mosher and Outcalt's ways of doing business and I shall prefer to manage my own affairs hereafter.

Q. Did he in any conversation you had with him say anything about the amount of the capital stock of the bank that was tied up in real estate?

A. Yes, some $130 or $140 thousand dollars, about 140,000 he said was tied up.

Q. Do you remember about the time when the last dividend of the bank was returned?

162 Respondent objects as incompetent and immaterial and not the best evidence.

A. It was a dividend of four per cent. declared in July, 1892, That is the last dividend I was credited with.

Q. Did you have any talk with the respondent, A. P. S. Stuart, as to whether a dividend would be returned the first of January, 1893, or for the close of the year 1892?

A. Well, only this, the Professor told me that in all probability there would be no dividend declared in January, owing to the fact that a large amount of the bank's capital was tied up in real estate, and until the amount was reduced and property converted into cash the bank could not pay any dividend.

Cross-examination.

By Mr. FLANSBURG:

Q. You say, Mr. Gerner, that he said he did not like the way that Mosher and Outcalt did the business. Did he give you in detail the management of that business he objected to, or was that the sum total of his remarks, that he did not like the way they did business?

A. He says, oh, yes, he made comments on Mosher's being in so many things and having so many irons in the fire and paying too much attention to outside matters. As to Outcalt, I do not know whether the Professor made any comments on his conduct or not.

Q. And the reason he gave you at that time for getting out was because he wanted to manage his own business, and he did not like the way they managed the business?

A. He did not like the way they conducted the business.

Redirect examination.

By Mr. LAMBERTSON:

Q. Did Mr. Stuart say where this land was situated, or what land it was?

A. Yes, he mentioned lands up in York county.

Q. Did he mention how or on whose account this York County land came into the hands of the bank?

A. Oh, no, not in that connection. He might have mentioned to me previous to that time that the bank had a large amount of

land caused by the Small matter, but that was something I was not familiar with and the Professor knew that and never went into the details, there was no occasion for it, because it was a matter I did not know anything about and did not concern me in the least.

Q. You were not a director in the bank yourself, were you?

A. Never.

163 Q. Did the bank pay any dividend on the 1st day of January, 1893?

Respondent objects as incompetent and immaterial and not the best evidence.

A. No, sir.

HENRY GERNER.

Witness excused.

AUGUSTUS THEODORE GRUETTER, being by me first duly cautioned, examined, and solemnly swor o testify the truth, the whole truth and nothing but the truth, te: ed as follows:

Questioned by Mr. LAMBERTSON:

Q. What is your full name?

A. Augustus Theodore Gruetter.

Q. How long have you resided in Lincoln?

A. About 19 years.

Q. What is your business?

A. I am engaged in the furniture business.

Q. Are you acquainted with the respondent in this case, A. P. S. Stuart?

A. Yes, sir.

Q. And how long have you known him?

A. Well, I have known him I think for about three years—that is, I have known him before that by sight, but was not acquainted with him. I heard his name mentioned, etc., before that.

Q. Did you purchase from him any bank stock in the Capital National bank?

A. Yes, sir; we took it in trade for the building.

Q. What date was that?

A. I think the trade was made on the 17th of December, if I am not mistaken.

Q. What year?

A. 1892. The deed (*were*) turned over about a week later.

Q. What did you trade for that property?

A. We sold him the building for $67,500.00.

Q. How much of a mortgage was on that building?

A. $30,000.00.

Q. Was there any other liens?

A. No liens of any kind.

Q. And what did he pay you?

A. He paid us $19,500 in cash, we accepted the bank stock, $15,000 worth for $18,000.00 and he assumed the mortgage of $30,000.

164 Q. Did you execute to him a lease of the building?

A. Yes, sir; the corporation—Gruetter & Joers Furniture & Carpet Company corporation made a lease with him for the building.

Q. How much?

A. Ten years at a yearly rental of $6,000.00.

Q. Now, you may state what representations were made to you, if any, as to the value of that stock and the condition of the bank by the respondent, A. P. S. Stuart, at or about the time the exchange was made.

Respondent objects as not the best evidence and as incompetent and immaterial, and no foundation laid.

A. Mr. Stuart came in there before we made the trade, and we asked him about the soundness of the Capital National bank and he said that the bank was in a safe condition, then when we spoke about taking the stock he also stated that he had been offered $1.25 by eastern parties only a few months before that time. I then afterwards called his attention to the fact that the surplus of the bank on the December statement was only $6,000.00, to which he replied that had been caused through the bank examiner throwing out all the bad paper of the bank a few months before, which amounted to about $30,000.00. But he said at the same time, that paper was not as bad as they took it to be, as the bank had already $14,000.00 of that paper in judgments against good parties, and this $14,000 would be added to the amount of the surplus as soon as that had been collected. I told Mr. Stuart at the time that we were offered $65,000.00 for the building in cash.

Respondent moves to strike out the last statement of the witness as voluntary on the part of the witness and as hearsay and incompetent.

A. (continued). I told him that we were offered that much in cash, and would accept the bank stock at no price, and would not take it under any consideration unless the bank was in good condition, and I also mentioned to him that I had found out through one of my friends that the bank seemed to be a little hard up, and was not loaning money very freely at that time, and I asked him what was the reason of it and he said that was only the case temporarily, and the bank would be in very much better shape soon, as they had been obliged to take a number of pieces of York County real estate for bad paper, and this real estate they were intending to sell, and as soon as that was sold they would be feeling much easier. In order to get us to take the stock he also said to us, in his own
165 words, "If I can make a turn or two shortly I will be glad to take the stock back from you at the very price you paid me for it, because it has paid me from 12 to 20 per cent. dividends, and the business outlook being very good, I think it will pay high dividends for the next — years." We then spoke also about the dividends, and the Professor said that he was not quite sure whether

or not there would be any dividend in January, but if there was any he considered himself entitled to that, but this we did not agree upon. We had quite a conversation about it. We said if we paid him as much as $1.20 for the stock we should have the dividends. Then I called his attention to the fact that the statement showed an undivided profit of about $21,000.00, and I mentioned that I surely thought they would declare a dividend out of the undivided profits. He replied that as the surplus was so small they would (verly) likely add the undivided profits this time to the surplus fund. Finally we came to an agreement to accept the stock on these representations; knowing that he had been very long a director and a chairman of the finance committee, we thought, of course, he knew all about the condition of the bank——

Respondent objects to the witness stating what the parties thought, and move- to strike out the statement of the witness in that respect as not responsive and as immaterial and incompetent under the issues.

Q. Did you rely on these representations made by the respondent?

Respondent object- as immaterial and incompetent under the issues.

A. We did; we relied on his own representations and we relied on the statements also.

Q. What statement?

A. The statement of the bank; the December statement that I referred to before. We compared that statement of the Capital National bank with the statement of the First National bank at that time, and the book value of the First National bank was about $1.40——

Respondent object- to this statement of the witness and moves to strike the same out.

A. (continued). And the book value of the Capital National bank was about $1.10 at that time. I happened to know that the First National bank stock sold at $160——

Respondent moves to strike out the testimony in regard to the First National bank as incompetent and immaterial and not the best evidence and not responsive to the question.

166 A. (continued). And the Capital National bank being valued at $1.10, I thought $1.20 would be a fair value——

Respondent objects to this evidence and moves to strike the same out as incompetent and irrelevant, not responsive to the question, and being an opinion of the witness.

Q. You may state whether or not you relied upon the statements made by the respondent, A. P. S. Stuart, and believed them to be true?

A. Yes, sir; I did.

Q. And did you rely on the published statement or the report to the comptroller which was published?

A. Yes, sir.

Q. Do you remember the date of that report?

A. I think the report was the 9th of December, but I think it was published on the 17th.

Q. The 17th of December?

A. Yes, sir; the 17th of December, 1892. The day we closed the transaction.

Q. Did Professor Stuart know that you had seen this report?

Respondent objects to the question as incompetent.

A. Yes, sir.

Q. Did you have any conversation with him about that report?

Respondent objects as leading and incompetent.

A. Yes; I called his attention to the fact that there was only $6,000 surplus, so we spoke about the statement.

Q. I call your attention, Mr. Gruetter, to what purports to be the original report of the condition of the Capital National bank at Lincoln, Nebraska, at the close of business on the 9th day of December, 1892, made to the Comptroller of the Currency, and bearing date the 15th day of December, 1892, a copy of which has been offered in evidence in this case, and ask if that is the report which you say was published in the Journal and about which you talked with the respondent, A. P. S. Stuart?

Respondent objects to this question as incompetent and immaterial and having no foundation laid.

A. Yes; this seems to be the same statement—$6,000 surplus and the undivided profits, $21,180.75. I remember those exactly. Of course, I cannot remember all these figures, but those—the main figures—I remember.

Q. What was your conversation with Professor Stuart about this report, if anything?

167 A. The conversation was that the statement was a very good one I thought with the exception of having a low surplus.

Q. This particular statement was not signed by Professor Stuart as one of the directors?

A. No; but he had signed other reports I had seen before. I had always compared the statements, I had been in the habit of doing that right along.

Q. I call your attention to a report made to the Comptroller of the Currency of the condition of the Capital National bank at the close of business on the 30th day of September, 1892, a copy of which had been offered in evidence, and which is signed by C. W. Mosher, president, and A. P. S. Stuart as one of the directors, and ask you whether you have any memory of seeing that particular statement?

A. I am not quite certain I have seen it, but I would not remember much about the figures because I did not examine that sa

closely as I did the other one, not intending to make a trade for that stock.

Q. Did you rely upon this other statement of the condition of the Capital National bank, and other statements published by that bank, including the one I have last shown you, in making up your mind to make this trade?

A. Yes, I did, as I remembered that they were always very good statements.

Q. You believed them to be true, did you?

A. Oh, yes, I believed them to be true, if not I would not have thought of trading for the stock, if that had not been the case.

Q. Did you make any inquiry of any officer of the Capital National bank as to its condition?

A. Yes, sir; I did.

Q. What officer?

A. I went to Mr. Outcalt in his office and inquired of him if the bank was in a good condition and what the stock was worth; I told him we were about trading for some of the stock, and would like to know what it was worth. His reply was that the stock was worth what any one wanted to pay for it, but as much as he remembered, the last sales had been made at the price of $1.30 to $1.40. He then inquired from me who had been offering his stock for sale, and I told him I was not at liberty to tell, because the trade was not completed.

Q. How long after you consummated that trade and got this stock was it before the bank closed its doors?

A. I think the agreement was signed on the 17th and I believe that the bank failed about the 19th of January, just about one month after.

168 Q. About a month after you became the owner of the stock?

A. Yes, I think it was the day before Christmas when we actually got hold of the stock, I think it was the 23rd or 24th of December that we got the certificates, but they were not transferred until after the first of January.

(—.) They were not transferred on the books of the bank until after the first of January?

A. No, sir.

Q. Was this stock purchased by the firm of Gruetter & Joers?

Respondent objects to the question as leading.

A. No. Well, yes, it was purchased by A. T. Gruetter & Company.

Q. Who constituted the firm of A. Gruetter & Company?

A. Charles F. Joers and A. T. Gruetter.

Q. What is the name of the corporation now engaged in the business there?

A. Gruetter & Joers Furniture & Carpet Company.

Q. That is a corporation, is it not?

A. Yes, sir.

Q. Now you may state, Mr. Gruetter, whether, counting this stock as worthless, the firm of A. T. Gruetter & Company or the individual

members were solvent and able to pay their liabilities, including the assessment on this stock, of 100 per cent.

Respondent objects as leading and calling for a conclusion of the witness, as incompetent.

A. Counting the bank stock as worthless, and assuming that we should be liable for the assessment of $15,000.00 we could not have paid. That is to say, after we counted the bank stock out as worthless, we might have had about $3,000 to pay the $15,000 assessment with, provided that our stock which we had at that time in the corporation was worth dollar for dollar, but if it had been necessary by suit to realize money out of the assets we would have been out at least $10,000 instead of being able to pay the assessment.

Q. You may state whether the firm of A. T. Gruetter & Company and the persons to whom this stock was transferred by the respondent Stuart would be able at the present time to pay this assessment of 100 per cent. on the stock, or any part of it, in the event a suit was brought and judgment obtained.

Respondent objects as leading, calling for a conclusion, incompetent and immaterial.

A. No, sir.

169 Cross-examination.

By Mr. FLANSBURG:

Q. Who first suggested to you, Mr. Gruetter, the idea of making a trade of that building to Professor Stuart?

A. That was Crooks.

Q. And how long was this before the 17th day of December?

A. Oh, I don't know the exact time, but I suppose it was several weeks before that.

Q. And you and Crooks had had considerable conversation, had you not, about this trade and concerning it?

A. Yes; we had been having a talk several times.

Q. And you had made several propositions and received some from Crooks, had you not?

Complainant objects as not proper cross-examination and as hearsay.

A. Yes; we did.

Q. Now, as a matter of fact, you had made some inquiry in regard to this stock, had you not, before the 17th day of December?

A. Certainly.

Q. And as to the condition of the bank?

A. Yes.

Q. You never had had any conversation with Professor Stuart until about this time, had you?

A. I think once before this.

Q. When was that?

A. I could not give the time.

Q. Was that conversation that you referred to in regard to this transfer the other conversation you say you had with him—that in regard to this transfer or trade with Professor Stuart?

A. I could not tell exactly you know, how many times I saw him, but I know Mr. Stuart came in once and looked over the building.

Q. Did you have any talk with him at that time?

A. I don't think I did.

Q. Then the next time you had a talk with him about the time the trade was consummated?

A. Yes, sir.

Q. And that was after you had these conversations with Crooks?

A. Yes.

Q. And after you had practically agreed upon the terms of bargain and sale?

170 A. No; we had not agreed at that time; the bargain was made with the Professor himself.

Q. You had looked up the bank stock at that time?

A. No; we had spoken about it some.

Q. You did not make any examination of the bank stock up to that time?

A. At the time I saw him? Yes; before that time.

Q. And had received this statement from him concerning which you have testified in your direct examination?

A. Yes.

Q. Did you make inquiries of any other person?

A. No; I think not.

Q. Did you obtain from Bradstreet, of Dun, or either of them about this time a special report upon the condition of this bank?

Complainant objects as incompetent, irrelevant, and immaterial.

A. No.

Q. Did you procure such a report to be made?

A. No.

Q. Did you ask for such a report of either of these agencies at that time?

A. No.

Q. The only persons, then, that you inquired of were Mr. Outcalt and Professor Stuart?

A. Yes, sir.

Q. You relied on what Mr. Outcalt told you, too, didn't you?

A. Yes; certainly I did.

Q. And then you had the conversation you testified to with Professor Stuart, the respondent, after you went to see Mr. Outcalt?

A. Yes, sir.

Q. And you an- he together made the trade?

A. Yes, sir.

Q. He told you a large amount of this stock was in real estate, did he?

A. No; not a large amount; he said some of it.

Q. And for that reason they would probably not be able to declare a dividend that January?

A. He expressed himself so, as if he was anxious to get the dividend himself, but at the same time he was not certain there would be one declared, and we stated that we were entitled to the dividend if there was any, and he expected there would be some, as the undivided profits were $21,000 and something.

171 Q. And you relied upon the statement you had seen published?

A. Yes, sir.

Q. Was the firm of A. T. Gruetter & Company solvent before they made this trade?

A. Yes, sir; they were.

Q. And could have paid their debts?

A. Yes.

Q. You got $19,500 in cash, did you?

A. Yes.

Q. And Professor Stuart assumed $30,000 of your obligations?

A. Yes.

Q. That made $49,500.00?

A. Yes, sir.

Q. And you took the stock at $18,000?

A. Yes, sir.

Q. And your liability would be $15,000, would it not?

A. Yes, sir.

Q. That would be $35,000.00, would it not?

A. Yes, sir; liability.

Q. And he paid you in cash and in discharge of your liabilities $49,500?

A. Yes; but we had about $30,000 or $40,000 more.

Q. Now at the time that this stock was transferred to and delivered to you, you were paid $19,500 in cash, you say?

A. Yes, sir.

Q. And the assessment at that time could only have been $15,000.00?

A. Yes, sir.

Q. Now, if the assessment had been collected at that time—at the moment of the transfer, did you not have $15,000 in cash in your hands?

A. I don't know at the time or not whether I had or not. The most of them were certificates of the Capital National bank.

Q. You collected them afterwards, did you not?

A. Yes, we did.

Q. So they were cash?

A. Yes, sir.

Q. And you had $19,500 from Professor Stuart at the very moment you received the transfer?

A. At the very moment we received them we turned part of them over to the bank for borrowed money and paid for merchandise East with them.

Q. Gruetter & Company had the benefit of it?

A. Yes, sir; certainly.

172 Q. How much stock did the firm of A. T. Gruetter & Company have on hand at the time of this transfer to them by Professor Stuart of this stock?

A. Merchandise?

Q. Yes.

A. About $30,000—a little over.

Q. When was the corporation of the Gruetter & Joers Furniture & Carpet Company organized?

A. It was organized in December, 1892.

Q. What time in December, 1892?

A. I do not remember the date exactly, the preliminaries and all were in December, the corporation commenced, I believe, in January—the 2nd of January.

Q. How was the stock of this corporation paid in?

A. 80 cents on the dollar by whoever bought it.

Q. Who bought or purchased it?

A. Mr. Joers bought some of it, and I bought some of it, and Mr. Lau bought some of it.

Q. How much did Gruetter & Joers buy of it?

A. Each $20,000. $16,000 to be paid in.

Q. Was that paid in?

A. It was paid in merchandise.

Q. $32,000 was paid in by Gruetter & Joers into this corporation?

A. Yes, sir.

Q. How much did Mr. Lau take?

A. $10,000.00.

Q. That corporation was not in existence and operation on the 17th day of December, was it?

A. No.

Q. Did both Gruetter & Joers, composing the firm of A. T. Gruetter & Company, transfer or purchase stock with merchandise belonging to the firm of A. T. Gruetter & Company?

A. Yes, sir.

Q. And that was all the stock they purchased was the stock they purchased in that way?

A. Yes, sir.

Q. And this $19,500 I understand that you received from Professor Stuart, respondent, was used by A. T. Gruetter & Company in liquidating bills of A. T. Gruetter & Company for this merchandise?

A. Yes, sir.

Q. So that really the corporation got the benefit of it to that extent?

A. Yes.

Q. Gruetter & Joers were apparently solvent, were they not, on the 17th day of December, 1892?

173 A. If we collected and sold our stock for what it was worth at regular prices we could pay our debts; yes, sir.

Q. And you would not be insolvent, then, if you had not been disturbed in the ordinary and regular course of business—A. T. Gruetter & Co.?

A. No.

Q. And you have not been disturbed in the ordinary and regular course of business, have you, as you went out of business?

No answer.

Q. Are the debts of A. T. Gruetter & Company discharged?

A. No; I am sorry to say they are not. We intended to sell the bank stock and take the proceeds and discharge them.

Q. How much were the debts of A. T. Gruetter & Company at that time?

A. I could not tell you exactly, but we owed for merchandis- at least $15,000 East, and had to be paid, and then of course we had to pay $1,000 commission to Crooks in making the sale, and we owed considerable for borrowed money to parties in Chicago and the bank here.

Q. Crooks was your agent, was he?

A. We did not hunt him for an agent, but he came and offered himself.

Q. You paid him a commission?

A. Yes.

Q. You accepted the benefit of what he did?

A. Yes, sir.

Q. I understand you to say in your direct examination that if this stock paid out dollar for dollar and you were permitted to conduct your business in the ordinary way, that the firm then would not be insolvent?

A. Considering whether we were liable for the $15,000. If we were not liable for that, of course then we could pay out, but if we were called upon to pay $15,000 we would have been bursted right away.

Q. You were apparently solvent at that time, so far as anybody knew?

A. Yes, sir.

Q. And had stock of about how much?

A. About $30,000.

Q. And an equity in this building worth, you claim, about $37,500?

A. Yes, sir.

Q. Professor Stuart at the time of the trade paid you $19,500 in cash?

A. Yes, sir.

174 Q. You never saw this statement before, that Mr. Lambertson had offered you, did you? You never saw this paper before?

A. No.

Q. You do not know whether this is the published statement or not, do you?

A. Well, I know only by some of the figures.

Q. Now, whether this statement was the same or not would depend largely, would it not, on whether these items were the same, and you could not tell whether it was the same statement?

A. I saw it published in the Journal, and if they are the same this is the same one.

Q. If that was the same you know, and if it is not you don't know?

A. Yes.

Q. There has been no suit brought against you, has there, Mr. Gruetter, to compel payment of this $15,000?

A. If I am right, I am instructed by my attorneys that we are made parties to a suit. Yes; we did get a notice. I have it in the safe.

Q. You got a notice from the receiver, but you have not been sued. Suit has not been brought by the receiver?

A. I think suit has been brought. I have a subpœna there or something, in this suit he has brought against the stockholders.

Q. No other suit than this has been brought?

A. No.

Q. You say, Mr. Gruetter, that you expected to take this $15,000 in bank stock and sell it and pay certain debts?

A. Yes, sir.

Q. Did you have an opportunity to sell a part of that bank stock after you had it?

A. No, sir; not after we had it.

Q. You never had any opportunity after you had the bank stock to sell it or a part of it?

A. No, sir.

Q. You did not receive an offer on $10,000.00 of that stock of $1.10?

A. No, sir; I did not.

Redirect examination.

By Mr. LAMBERTSON:

(—.) Mr. Gruetter, what did you do with the statement or report that you saw in the Journal, of the condition of the Capital National bank on December 9th? Have you got it with you?

175 A. Yes; I know what the statement is.

Q. Have you got it?

A. I have got a copy of it; yes, sir.

Q. Have you got it with you?

A. Yes, sir; this is a copy of it (handing paper to counsel).

Q. Is this a true and correct copy of the statement which you saw in the Journal and which you think was published December 17, 1892?

A. Yes, sir.

Q. And is that the statement about which you talked with the respondent, A. P. S. Stuart?

A. Yes, sir.

Complainant offers in evidence the statement identified by witness, and the same is hereto attached, marked Exhibit 81.

Respondent objects to this offer as immaterial and incompetent.

Q. Mr. Gruetter, can you tell what the liabilities were, at least approximately, if not accurately, of Gruetter & Joers at the time you purchased this stock?

A. Well, what would you want me to include—the mortgage?

(*A.*) Yes; include everything. If you have a memorandum you may refresh your memory from that.

Mr. FLAN-BURG: The respondent asks to be permitted to examine this memorandum and to cross-examine upon it if the witness uses it in answering this question to refresh his memory.

Q. You may answer the question.

—. ——.

(By Mr. FLANSBURG:)

Q. Do you refresh your memory from the memorandum which you took from your pocket a while ago?

Complainant objects to this question being propounded to the witness.

A. No; of course, it would be hard for me to give you the correct figures unless I turned to the books. Of course, I could tell by looking at the books, but as near as I can remember it must be $90,000.00 what we owed.

Q. That includes the mortgage on the building, does it?

A. Yes.

Q. Do you remember how much money you owed the First National bank here?

176 Respondent objects as leading and assuming facts of which there is no proof—as incompetent.

A. $20,000.00.

Q. You owed $15,000.00 for merchandise?

A. Yes.

Q. And $1,000 for commission?

A. Yes.

Q. Was there any more than that?

A. Yes; a good deal more for borrowed money. We owed $7,500 to Louie Meyer at that time.

Q. Were you surety or indorser on any paper which you have since paid?

Respondent objects as leading, calling for a conclusion, assuming facts not proven, and incompetent.

A. I paid $5,000 for my brother-in-law as security.

Q. Were you on that paper at that time?

A. Yes.

Q. Did you have any other bank than the First National bank?

A. Not the bank, it was mostly private parties that we owed.

Recross-examination.

By Mr. FLANSBURG:

Q. Who made this statement for you, Mr. Gruetter?
A. One of our clerks.
Q. What did he make it from?
A. From the journal.
Q. When did he make it?
A. Oh, he made it—I couldn't tell the time—some time ago.
Q. A month ago?
A. Longer ago than that, but I couldn't tell the time.
Q. Was it a year ago?
A. It may be, about.
Q. Do you know whether he copied it correctly or not?
A. Yes, sir; he did.
Q. Did you compare it to see?
A. No.
Q. You only know what he said about it?
A. I knew by some of the items it was correct, and he is very careful.
Q. And that is the reason you knew it was correct?
A. Yes, sir.
Q. You did not compare it yourself?
A. No, sir.
177 Q. You are relying on the fact that he copied it, and he is careful?
A. Yes, sir.
Q. And that is the reason you say it is correct?
A. Yes, sir.
Q. You owed the First National bank $20,000.00?
A. Yes, sir.
Q. What was that indebtedness represented by—a note or an open account?
A. Note.
Q. How were those notes signed?
A. A. T. Gruetter & C. F. Joers.
Q. You owed for merchandise $15,000.00 and the firm owed $5,000 commission and you owed Louie Meyer $7,500.00. Who signed for that?
A. A. T. Gruetter and *E.* F. Joers.
Q. Both of you?
A. Yes, sir.
Q. The $5,000 security. That was not signed by the firm, was it?
A. Yes, sir.
Q. The note was signed by A. T. Gruetter and the firm did not get the benefit of it, did it?
A. If there was any benefit I guess they did.

AUGUST THEODORE GRUETTER.

CHARLES F. JOERS, being by me first duly cautioned, examined and solemnly sworn, questioned by Mr. Lambertson, testified as follows:

Q. Are you a member of the firm of Gruetter & Joers?
A. Yes, sir.
Q. Are you acquainted with the respondent here, A. P. S. Stuart?
A. Yes, sir.
Q. How long have you lived in Lincoln?
A. About 20 years.
Q. Do you remember the time when the firm of A. T. Gruetter & Co. purchased the 150 shares of stock in the Capital National bank from Mr. Stuart?
A. Yes, sir.
Q. You may state what conversation was had with Mr. Stuart relative to the purchase of that stock, either with yourself or between Mr. Gruetter and Mr. Stuart which you overheard.
A. Mr. Stuart made a statement of the soundness of the bank. He said that he was offered for the stock $1.25 just a couple of months before.
178 Q. What else did he say about it? What if anything did he say about the condition of the bank?
A. He said that the bank was in a sound (coundition), only that lately the bank examiner had thrown out all the bad paper, to the amount of about $30,000.00, but pretty soon it would be in a better shape because it had a mortgage on a lot of real estate and farm land, and they would realize on that about $14,000.00 soon.
Q. Did he say anything about its paying dividends?
A. Well, the Professor said they would not perhaps pay dividends for the last six months, on account of this bad paper being thrown out, but if there was any dividend that he wanted it, but finally after our having it back and forth he agreed to let us have the dividend for the last six months, to January.
Q. Did you see this published statement in the Lincoln Journal?
A. Yes, sir; Mr. Gruetter brought it down in the morning, early. He generally brought the Journal down in the morning, and we had been waiting for that statement—in fact we had been waiting for several days to look at that.
Q. Did you rely upon the facts set forth in that statement?
A. Yes, sir.
Q. Did you believe them to be true?
A. Yes, sir.
Q. Did you rely upon the statements made to you by Mr. Stuart?
A. Yes, we did, because Mr. Stuart had been interested in the bank for some time, and on the finance committee, and he ought to know how the standing was.
Q. You knew he was chairman of the finance committee of the Capital National bank?
A. Yes, sir.
Q. Did you believe the statements he made to you as to the condition of that bank to be true?

A. Yes, sir.
Q. And you believed it to be a good, safe condition, did you?
A. Yes, sir.
Q. And relied upon his statements?
A. Yes, sir.

Cross-examination.

By Mr. FLANSBURG:

Q. You say you knew he was the chairman of the finance committee?
A. Yes, sir.
Q. How long had you known that?
(—.) We talked about it before, and we believed it.
179 Q. He told you that?
A. I would not swear to that. I don't know whether we learned it from him or from some one else.
Q. So you relied upon this statement?
A. Yes, sir.
Q. And waited for it several days?
A. Yes, sir.
Q. Had you any talk with Mr. Stuart prior to this time in regard to the bank?
A. We had seen Mr. Stuart perhaps three or four times.
Q. Had you seen him prior to the time you received this statement of the condition of the bank?
A. Yes; we saw him a few times.
Q. And talked with him about the condition of the bank?
A. Yes, sir.
Q. And you were waiting for this statement to see if it confirmed what he said?
A. Yes, that was natural, for it was about the time for the statement to come out.
Q. Gruetter & Joers or A. T. Gruetter & Co. still have that bank stock, hav-n't they?
A. Yes, sir.
Q. You never have offered to return it to Professor Stuart, have you?
A. No, sir.
Q. And you have never offered to return him his $19,500?

Complainant objects as incompetent, irrelevant and immaterial, and not proper cross-examination.

A. No, sir.
Q. You still have that?

Complainant objects as not proper cross-examination.

A. Yes, sir.
Q. Where were you when these conversations were had between Professor Stuart and Mr. Gruetter?

A. That was in the office.
Q. Were you there all the time?
A. Mostly.
Q. Did they have any conversation you did not hear?
A. They might have had a few words but most times I was present.
Q. Were you present when the trade was ultimately made?
A. Yes, sir.
Q. You never went with Mr. Gruetter to Mr. Outcalt to see about what the condition of the bank was?
A. No, sir.
180 Q. You relied upon him to do that?
A. Yes.
Q. Professor Stuart wanted the dividend on this stock that it had earned the six months since the payment of the last dividend, the six months which had almost expired at the time the trade was made?
A. Yes, sir.
Q. That was one thing that seemed to stand in the way of the trade for a while, was it not—the dividend? You wanted that and Professor Stuart wanted it?
A. Yes, sir.
Q. And he agreed that you should have it?
A. Yes, sir.
Q. What conversation was this, the first or the last conversation that took place?
A. The last one.

CHARLES F. JOERS.

Witness excused.

Certificate.

STATE OF NEBRASKA, } ss:
Lancaster County, }

I, E. J. Hedges, a notary public duly commissioned and qualified for and residing in the county of Lancaster and State of Nebraska, do hereby certify that Kent K. Hayden, Deborah G. King, Henry Gerner, Augustus Theodore Gruetter, and Charles F. Joers were by me first several duly cautioned, and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them respectively subscribed as above set forth were reduced to writing by me, and in the presence of the said witnesses respectively, and were respectively subscribed by the said witnesses in my presence, and were taken in pursuance of the stipulation hereto annexed; that I am not counsel, attorney or relative of either party, or otherwise interested in the event of this suit.

In witness whereof, I have hereunto set my hand and official seal at Lincoln, Nebraska, this 30th day of March, A. D. 1895.

[SEAL.] E. J. HEDGES,
Notary Public.

My commission expires March 28, 1899.

181 *Costs.*

Swearing five witnesses	$ 50
380 hundred words	76 00
One certificate	25
Express	50
Fees of Kent K. Hayden as witness	1 50
Fees of Deborah G. King as witness	1 50
Fees of Henry Gerner as witness	1 50
Fees of Augustus Theodore Gruetter as witness	1 50
Fees of Charles F. Joers as witness	1 50
	$84 75

Paid by plaintiff.

[SEAL.] E. J. HEDGES,
Notary Public.

My commission expires March 28, 1899.

M. L. Mc. V. H. C. A. R. R.

TREASURY DEPARTMENT,
Office of the Comptroller of the Currency, } *ss:*

Under the provisions of section 884 of the Revised Statutes of the United States, I, James H. Eckels, Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original order for the assessment on the shareholders of the Capital National Bank of Lincoln, Nebraska, made on the 10th day of June, 1893, and of the whole of said original on file and of record in my office.

In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington and District of Columbia, this eighth day of August, A. D. 1893.

[SEAL.] JAMES H. ECKELS,
Comptroller of the Currency.

EXH. 1—E. H.

No. 2988.

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, *June* 10, 1893.

In the Matter of "THE CAPITAL NATIONAL BANK OF LINCOLN," NEBRASKA.

To all whom it may concern:

182 Whereas upon a proper accounting by the receiver heretofore appointed to collect the assets of "the Capital National Bank of Lincoln," Nebraska, and upon a valuation of the un-

collected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed by sections 5151 and 5234 of the Revised Statutes of the United States:

Now, therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of said Capital National Bank of Lincoln for three hundred thousand dollars, to be paid by them ratably on or before the tenth day of July, 1893; and I hereby make demand upon each and every one of them for one hundred dollars upon each and every share of the capital stock of said association held or owned by them respectively at the time of its failure; and I hereby direct K. K. Hayden, the receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enfore to (*a*) that extent the said individual liability of the said shareholders.

In witness whereof I have hereto set my hand and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this tenth day of June, A. D. 1893.

[SEAL.] JAMES H. ECKELS,
Comptroller of the Currency.

Ex. 2—E. H.

(Copy.)

Certificate No. 36, for 100 shares, issued to A. P. S. Stuart, dated Nov. 1, 1884; transferred from —— ——, dated ——, 188-.

No. original certificate.	No. original shares.	No. of shares transferred.

Received this certificate.....

183 Ex. 3—E. H.

(Copy.)

No. 53, for 50 shares, issued to A. P. S. Stewart, dated July 1, 1886; transferred from —— ——, dated ——, 188–.

No. original certificate.	No. original shares.	No. of shares transferred.
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

Received this certificate.....

.....

Ex. 4—E. H.

(Copy.)

State of Nebraska.

The Capital National Bank of Lincoln, Neb.

No. 36. 100 shares.

This is to certify that A. P. S. Stewart is entitled to one hundred shares of one hundred dollars each of the capital stock of the Capital National bank transferable only on the books of the bank in person or by attorney on the surrender of this certificate.

[SEAL.] Witness the seal of the bank and the signatures of the president and cashier this 1st day of Nov., A. D. 1884.

R. C. OUTCALT, *Cash'r.*
C. W. MOSHER, *Pres't.*

[Printed across the face:] Cancelled Jan'y 3, 1893; #154 & 155 issued.

Shares $100 each.

For value received, the undersigned hereby sell, assign, and transfer unto —— —— — shares of the Capital National Bank of Lincoln, Nebraska, and do hereby constitute and appoint —— —— my true and lawful attorney (irrecocable) and in my name and behalf to make and execute all necessary acts of assignment and transfer required by the regulations and by-laws of said bank.

In witness whereof — have hereunto set — hand this — day of ——, 188–.

A. P. S. STUART.

Ex. 5—E. H.

(Copy.)

State of Nebraska.

The Capital National Bank of Lincoln, Neb.

No. 53. 50 shares.

This is to certify that A. P. S. Stuart is entitled to fifty shares of one hundred dollars each of the capital stock of the Capital National bank transferable only on the books of the bank in person or by attorney on the surrender of this certificate.

[SEAL.] Witness the seal of the bank and the signatures of the president and cashier this first day of July, A. D. 1886.

R. C. OUTCALT, *Cash'r.*
C. W. MOSHER, *Pres't.*

[Printed across the face:] Cancelled Jan'y 3, 1893; # 153 issued.

Shares $100 each.

For value received, the undersigned hereby sell, assign, and transfer unto —— —— — shares of the capital stock of the Capital National Bank of Lincoln, Nebraska, and hereby constitute and appoint —— —— my true and lawful attorney irrevocable for and in my name and behalf to make and execute all necessary acts of assignment and transfer required by the regulations and by-laws of said bank.

In witness whereof — have hereunto set — hand this — day of ——, 188–.

A. P. S. STUART.

Ex. 6—E. H.

(Copy.)

Certificate No. 153, for 50 shares, issued to Gruetter & Joers, dated Jan. 3, 1893; transferred from —— ——, dated July 1st, 1886.

No. original certificate.	No. original shares.	No. of shares transferred.
53	50	50
.....	.....	.....
.....		
.....	.....	.....

Received this certificate .....

.....

185

Ex. 7—E. H.

(Copy.)

Certificate No. 154, for 50 shares, issued to Gruetter & Joers, dated Jan. 3, 1893; transferred from A. P. S. Stuart, dated Nov. 1, 1884.

No. original certificate.	No. original shares.	No. of shares transferred.
36	100	50

....

....

.....

Received this certificate.....

....

Ex. 8—E. H.

(Copy.)

Certificate No. 155, for 50 shares, issued to Gruetter & Joers, dated Jan. 3, 1893; transferred from

.....

Dated.....188..

No. original certificate.	No. original shares.	No. of shares transferred.

....

.. ..

....

....

....

Received this certificate.....

....

186 Ex. 9—E. H. 753.

(Copy.)

A. P. S. Stuart.

1892.				1892.		
84.						
Nov. 1, No. 36	100	10,000		Jan. 3, '93	100	10,000
86.						
July 1, 53	50	5,000		" 3, '93	50	5,000

Ex. 10—E. H. 799.

(Copy.)

Gruetter & Joers.

1893.		
Jan. 3, 153	50	5,000
" 154	50	5,000
" 155	50	5,000

Ex. 11—E. H.

Registry return receipt sent July 7, 1893.
Reg. No. 120 from post-office at Lincoln, Nebr.
*Reg. letter / Reg. †[parcel] } addressed to A. P. S. Stuart.

.....

After obtaining receipt below, the postmaster will mail this card, without cover and without postage, to address on the other side.

Received the above-described registered { *letter. / †[parcel].

(Sender's name on other side.)

Sign on dotted lines to the right. When delivery is made to other than addressee, the name of both addressee and recipient must appear. } A. P. S. Stewart.

.....

When the registered letter or parcel accompany- this card is delivered, the postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

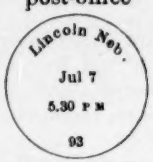
---

* Erase letter or parcel according to which is sent.
† [Word enclosed in brackets erased in copy.]

187 A penalty of $300 is fixed by law for using this card for other than official business.

Post-office Department.

Official business.

Post-office at { Stamp here name of post-office  and date of delivery.

Return to:

Name of sender: K. K. Hayden.

Street and number, or post-office box. .....



Post-office at Lincoln,

County of Lancaster, State of Nebraska.

Treasury Department, office of the Comptroller of the Currency.

WASHINGTON, *June* 10, 1893.

In the Matter of the CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA.

To all whom it may concern:

Whereas, upon a proper accounting by the receiver heretofore appointed to collect the assets of "The Capital National Bank of Lincoln," Nebraska, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction, that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed by sections 5151 and 5234 of the Revised Statutes of the United States.

Now, therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said Capital National Bank of Lincoln for three hundred thousand dollars, to be paid by them ratably on or before the tenth day of July, 1893; and I hereby make demand upon each and every one of them for one hundred dollars upon each and every share of the capital stock of said association held or owned by them, respectively, at the time of its failure; and I hereby direct K. K. Hayden, the receiver heretofore appointed, to take all necessary pro-
188 ceedings, by suit or otherwise, to enforce to that extent the said individual liability of the shareholders.

In witness whereof I have hereto set my hand and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this tenth day of June, A. D. 1893.

[SEAL.] JAMES H. ECKELS,
Comptroller of the Currency.

Ex. 12—E. H.

Office of the receiver of the Capital National Bank of Lincoln, Nebr.

LINCOLN, NEB., *June* 10, 1893.

You will please take notice that the Comptroller of the Currency has levied an assessment upon the stockholders of the Capital National Bank of Lincoln, Nebr., of one hundred dollars ($100.00) a share, payable at the office of the receiver on or before July 10, 1893.

You are therefore requested to pay the amount of your assessment according to the aforesaid notice; otherwise the assessment will bear interest from July 10th, 1893, and suit will be commenced to enforce payment.

—— ——, *Receiver.*

To —— ——.

Ex. 13—E. H.

Copy.

Pages 36 and 37.

Special Meeting.

At a special meeting of directors held May 23, 1884, at office of Marsh National bank, there were present, W. A. Sharrer, E. W. Mosher, R. C. Outcalt, and C. W. Mosher.

On motion of Mr. Outcalt, the name of the bank shall be Cap-
189 ital National bank after May 31st, at close of business on that day, and that out of the undivided profits as shown by books at close of business May 31st $1,500.00 shall be carried to surplus ac. and the balance of profits shall be divided among stockholders in lieu of regular July dividend.

That on June 1st the capital stock of this bank shall be increased to $200,000, and proper notification of same be forwarded to the Comptroller of Currency.

Resignation of C. W. Marsh as vice-pres't having been received, same was accepted, and H. J. Walsh elected to fill the vacant place, to commence at close of business on May 31st, 1884.

The number of directors having been increased to seven, C. E. Yates and E. P. Hamer were elected to make up the number, to commence May 31st, 1884.

Messrs. R. C. Outcalt, C. W. Marsh, E. W. Mosher, W. A. Sharrer, resignation having been handed in, same were accepted, and the names of A. P. S. Stuart, W. W. Holmes, R. O. Phillips, and D. E. Thompson proposed in their places and were duly elected to take office at close of business May 31st, 1884.

Adjourned.

C. W. MOSHER, *P't.*

R. S. OUTCALT, *Sec'y.*

Copy. 40.

Stockholders' Meeting.

At meeting of stockholders held second Tuesday in January of 1885, there *was* present A. P. S. Stuart, W. W. Holmes, R. E. Moore, C. E. Yates, D. E. Thompson, C. W. Mosher, and R. C. Outcalt.

Upon motion of Mr. Stuart the old board of directors were renominated, and, upon vote of stockholders, unanimously elected.

Meeting then adjourned.

C. W. MOSHER, *P't.*
R. C. OUTCALT, *Cash., Sec'y.*

Directors' Meeting.

At meeting of directors held this second Tuesday in January, 1885, present A. P. S. Stuart, W. W. Holmes, C. E. Yates, D. E. Thompson, C. W. Mosher; motion of C. E. Yates was carried to effect,
190 that out of the undivided earnings of the past six months that a dividend of 6½ per cent. be paid, 1 per cent. be carried to surplus, and balance remain in undivided profit ac.

Upon motion of A. P. S. Stuart the old officers were elected.

Meeting adjourned.

C. W. MOSHER, *P't.*
R. C. OUTCALT, *Cash., S'c'y.*

Ex. 14—E. H. 41.

Copy.

Directors' Meeting.

At a regular meeting of directors held this second Tuesday in July, 1885, there *was* present C. W. Mosher, W. W. Holmes, A. P. S. Stuart, C. E. Yates, E. P. Hamer.

Upon motion of W. W. Holmes a dividend of 6½ per cent. was declared, 1 per cent. run to surplus and bal. to remain in undivided profit ac.

Meeting adjourned.

C. W. MOSHER, *P't.*

Stockholders' Meeting.

At a regular meeting of stockholders this second Tuesday in January, 1886, the following were present, W. W. Holmes, A. P. S. Stuart, Geo. Ballentine, C. W. Mosher, R. C. Outcalt.

Upon motion of W. W. Holmes the old board of directors were re-elected.

Meeting adjourned.

C. W. MOSHER, *P't.*
R. C. OUTCALT, *Cash., S'c'y.*

Ex. 15—E. H. 42.

Copy.

Directors' Meeting.

At regular meeting of directors held second Tuesday in January, 1886, present W. W. Holmes, A. P. S. Stuart, C. W. Mosher, R. O. Phillips, C. E. Yates.

191 Upon motion of R. O. Phillips, a dividend of 8 per cent. and 1 per cent. run to surplus was declared.

Meeting adjourned.

C. W. MOSHER, *P't.*
R. C. OUTCALT, *Cash., S'c'y.*

Stockholders' Meeting.

At special meeting of stockholders held June 2, 1886, at office of bank, present C. W. Mosher, R. C. Outcalt, C. E. Yates, H. J. Walsh, A. P. S. Stuart, G. Ballantine, R. E. Moore, D. E. Thompson, W. W. Holmes. Upon motion of H. J. Walsh a resolution was passed asking the comptroller for permission to increase capital stock to $300*,*000 on July 1, 1886. Upon vote it was carried as follows:

C. W. Mosher	600
R. C. Outcalt	330
G. W. Ballantine	100
D. E. Thompson	140
R. E. Moore	10
H. J. Walsh	100
W. W. Holmes	100
A. P. S. Stuart	100
C. E. Yates	50

C. W. MOSHER, *P't.*

R. C. OUTCALT, *Cash., S'c'y.*

Ex. 16—E. H. 43.

Copy.

Directors' Meeting.

At special meeting of directors held June 21, 1886, present R. O. Phillips, W. W. Holmes, A. P. S. Stuart, and C. W. Mosher, a resolution was introduced and upon vote same was carried, to authorize the Comptroller of Currency to transfer the bonds held by him in trust *by him* for the Marsh National bank to the credit and for the use of the Capital National bank.

Meeting adjourned.

C. W. MOSHER, *P't.*

R. S. OUTCALT, *Cash., S'c'y.*

Ex. 17—E. H. 47.

Copy.

Directors' Meeting.

At regular meeting of board of directors held at bank-room on July 13, 1886, there *was* present C. W. Mosher, A. P. S. Stuart, E. P. Hamer, R. O. Phillips, and C. E. Yates.

192 On motion of A. P. S. Stuart it was voted to declare a dividend of 7 per cent. and run 1 per cent. to surplus out of the undivided profits of the bank.

No further business coming before the board, meeting adjourned.

Directors' Meeting.

Special directors' meeting held at office of bank Oct. 15, 1886. Present R. O. Phillips, C. W. Mosher, W. W. Holmes, C. E. Yates.

On motion of R. O. Phillips, the following resolution was passed: "Resolved, That the president of the Capital National bank be authorized to indorse the notes and bills discount of said bank, when it may become necessary to rediscount the same."

No further business coming before the meeting, they adjourned.

C. W. MOSHER, *P't.*
R. C. OUTCALT, *S'c'y.*

Ex. 18—E. H. 50.

Copy.

Directors' Meeting.

At regular meeting of directors held at office of bank there *was* present on July 12, 1887, A. P. S. Stuart, C. W. Mosher, D. E. Thompson, E. P. Hamer. Upon motion of D. E. Thompson a dividend of 6 per cent. was declared & $2,000 ordered put to surplus. A. P. S. Stuart made motion that J. W. Maxwell be made ass't cashier.

Meeting adjourned.

C. W. MOSHER, *P't.*
R. C. OUTCALT, *S'c'y.*

Ex. 19—E. H. 51.

Copy.

Stockholders' Meeting.

At annual meeting of stockholders there *was* present on Jan. 10, 1888.

193

A. P. S. Stuart	150	shares
D. E. Thompson	230	"
R. C. Outcalt	350	"
H. J. Walsh	150	"
R. O. Phillips	150	"
C. W. Mosher	550	"

Upon motion of Mr. D. E. Thompson the sec'y was instructed to cast ballot for re-election of the old board of directors.

Motion of R. O. Phillips, meeting adjourned.

C. W. MOSHER, *P't.*
R. C. OUTCALT, *S'c'y.*

Ex. 20—E. H. 52.

Copy.

Directors' Meeting.

At regular meeting of directors held at 8 p. m. Jan. 10, 1888, there were present A. P. S. Stuart, R. O. Phillips, C. E. Yates, C. W. Mosher, D. E. Thompson.

Upon motion of Mr. D. E. Thompson the by-laws were amended to read as follows:

Section 14, line 5, erase April and October.

Section 17 amended to read:

"No money shall be paid out on any check drawn upon the bank or on any order unless the drawer of such check or order at the time of the presentation thereof had on deposit in the bank funds sufficient to meet such check or order, except on the approval of the president or cashier."

Motion unanimously carried.

There being a net profit on the business of last six months of 20,024.41, upon motion — R. O. Phillips a dividend of 6 per cent. was declared & $2,000 carried to surplus.

Meeting adjourned.

C. W. MOSHER, *P't.*

R. C. OUTCALT, *S'c'y.*

194 Ex. 21—E. H. 53.

Copy.

Directors' Meeting.

At regular meeting of board of directors held on July 10, 1888, A. P. S. Stuart, C. W. Mosher, W. W. Holmes, E. P. Hamer present.

Upon motion of E. P. Hamer, a dividend of 6 per cent. was declared & $2,000 carried to surplus.

Meeting adjourned.

C. W. MOSHER, *P't.*
R. C. OUTCALT, *S'c'y.*

Ex. 22—E. H. 54.

Copy.

Stockholders' Meeting.

At meeting of stockholders held at office of bank on Jan. 8, '89, at 8 o'clock, there *was* present—

D. E. Thompson	230	shares
C. E. Yates	103	"
A. P. S. Stuart	150	"
W. W. Holmes	150	"
R. C. Outcalt	350	"
H. J. Walsh	150	"
H. Gerner	50	"
C. W. Mosher	550	"
J. McConniff	37	"
C. Thompson	50	"
	1,820	

On motion of Mr. Yates the sec'y was instructed to cast the ballot for directors the ensuing years as follows:

C. W. Mosher, A. P. S. Stuart,
D. E. Thompson, R. O. Phillips,
W. W. Holmes, C. E. Yates.
E. P. Hamer,

Motion of A. P. S. Stuart, meeting adjourned.

C. W. MOSHER, *P't.*
R. C. OUTCALT, *S'c'y.*

195 Ex. 23—E. H. 55.

Copy.

Directors' Meeting.

On motion of Mr. Thompson the old officers were elected to serve for the ensuing year.

Mr. Thompson moved that Directors Holmes & Stuart be appointed a committee to examine the notes of the bank, & also to make as many such examinations of notes & books as they may see fit.

The earnings of the bank for the last six months showing net earnings of	20,572	74
Undivided profits	305	12
	20,877	86

On motion of Mr. Yates a dividend of 6 per cent. was declared payable at once & $2,000 carried to surplus fund.

Meeting adjourned.

C. W. MOSHER, *P't.*
R. C. OUTCALT, *S'c'y.*

Ex. 24—E. H.

Copy.

LINCOLN, NEB., *Jan.* 20, 1889.

As per instructions of the board of directors, we have examined paper of Capital National bank & find same satisfactory.

W. W. HOLMES.
A. P. S. STUART.

Copy. 56.

Directors' Meeting.

At regular meeting of directors held at office of bank at 8 o'clock p. m., July 9, 1889, there *was* present A. P. S. Stuart, W. W. Holmes, D. E. Thompson, C. E. Yates, & C. W. Mosher.

The earnings of the bank showing as follows:

Net earnings & undivided profits $20,598 38

196 Upon motion of Mr. Stuart & seconded by D. E. Thompson a dividend of six per cent. was declared & $2,000 run to surplus.

Upon motion of C. E. Yates meeting adjourned.

C. W. MOSHER, *P't.*
R. C. OUTCALT, *S'c'y.*

Ex. 26—E. H.

Stockholders' Meeting.

At regular annual meeting of stockholders held at office of bank at 8 o'clock Jan. 14, 1890—

It was moved by Mr. Stuart to increase the number of directors from seven to nine, and that the sec'y be authorized to cast the vote of stockholders for directors for ensuing year—with the result that A. P. S. Stuart, E. P. Hamer, H. J. Walsh, R. O. Phillips, D. E. Thompson, W. W. Holmes, C. E. Yates, R. C. Outcalt & C. W. Mosher were elected.

The number of shares of stock being present & voted as follows:

G. W. Ballantine	200
E. P. Hamer	75
W. W. Holmes	150
A. P. S. Stuart	150
R. O. Phillips	100
R. C. Outcalt	350
C. W. Mosher	550
	1,575

Upon motion of Mr. Outcalt meeting adjourned.

C. W. MOSHER, *P't.*

Ex. 27—E. H. 59.

Copy.

Directors' Meeting.

Regular meeting of directors held at office of bank July 11, 1890. There *was* present R. O. Phillips, C. E. Yates, W. W. Holmes, A. P. S. Stuart, C. W. Mosher.

The earnings of the bank showing as follows:

197 Net earnings & profits $17,500.19.

It was moved by A. P. S. Stuart that a dividend of 5 per cent. be declared & $2,000 added to surplus.

Upon motion of C. E. Yates meeting adjourned.

C. W. MOSHER, *P't.*

Ex. 28—E. H. 60.

Copy.

Stockholders' Meeting.

At regular annual stockholders' meeting held Jan. 13, 1891, at 7.30, at office of bank, there *was* present:

C. E. Yates	113 shares.
D. E. Thompson	250 "
A. P. S. Stuart	150 "
C. Hammond	50 shares.
E. P. Hamer	75 "
R. C. Outcalt	350 "
C. W. Mosher	550 "
	1,688 "

Upon motion of C. Hammond the sec'y was authorized to cast the vote for old directors. So done.

Upon motion of D. E. Thompson meeting adjourned.

C. W. MOSHER, *P't.*

Ex. 29—E. H. 61.

Copy.

Directors' Meeting.

At regular meeting of directors held at office of bank on Jan. 31, '91, at 8.30, there *was* present C. E. Yates, D. E. Thompson, W. W. Holmes, A. P. S. Stuart, *W. W. Holmes*, & C. W. Mosher.

It was moved by C. E. Yates that all the old officers be elected for ensuing year; which motion was unanimously carried.

A. P. S. Stuart moved and it was carried that a dividend of 5 per cent. be declared & $2,000 run to surplus and out of the $17,167.11 of undivided profits on hand.

C. W. MOSHER, *P't.*

198 Ex. 30—E. H. 62.

Copy.

Directors' Meeting.

At regular meeting of board of directors held at office of bank July 13, 1891, at 8 o'clock, there were present C. E. Yates, E. P. Hamer, D. E. Thompson, R. O. Phillips, C. W. Mosher—the books showing the following earnings & expenditures:

Left over from Jan. 1, '91		162 11
Gross earnings to July 1, '91		37,878 65
		38,040 76
Wages paid	6,644 98	
Int. "	8,943 71	
Expenses "	5,198 28	
		20,786 97
Net earnings		17,253 79

It was moved by R. O. Phillips that a dividend of 5 per cent. be declared & 2,000 run to surplus. A. P. S. Stuart moved that R. C. Outcalt be elected to fill the vacancy caused by the death of W. W. Holmes. Motion was seconded by E. P. Hamer and was unanimously carried.

Moved and carried by R. O. Phillips that Oscar Funke be authorized to sign d'fts for cashier until further notice.

Ex. 31—E. H. 63.

Copy.

Upon motion of D. E. Thompson, it was resolved as follows: That the Comptroller of Currency be and he is hereby authorized to withdraw $50,000 U. S. bonds deposited with the Treasurer of the U. S. by this bank to secure circulation and described as follows:

$50,000 of the loan 1891, 4½ per cent. interest, and that the Chemical Nat. bank be and is hereby authorized to sell, assign and transfer the same and to appoint one or more att'ys for that purpose.

Upon motion of Mr. A. P. S. Stuart & seconded by all present, the following resolution was unanimously adopted & a written copy ordered for purpose of delivering to the family of Mr. Holmes:

199

Upon motion of C. E. Yates meeting adjourned.

C. W. MOSHER, *P't.*

Ex. 32—E. H. 64.

Copy.

Stockholders' Meeting.

Held Jan. 12, 1892, at office of bank, at 8 o'clock; there *was* present the following stock:

C. E. Yates	113 s.
C. Thompson	50 s.
R. O. Phillips	50 s.
C. W. Mosher	550 s.
R. C. Outcalt	350 s.
H. Gerner	100 s.
J. K. Honeywell	50 s.
A. P. S. Stuart	150 s.
H. J. Walsh	150 s.
	1,563 s.

Mr. Stuart moved that old board of directors be declared re-elected for ensuing year.

Mr. Honeywell moved to adjourn, which was carried

C. W. MOSHER, *P't.*

Ex. 33—E. H. 65.

Copy.

Directors' Meeting, Held Jan. 12, 1892.

There *was* present A. P. S. Stuart, C. E. Yates, C. W. Mosher, R. O. Phillips, R. C. Outcalt.

Upon report of pres't that there was 18,128.02 net profits, it was moved and carried to declare a 5 per cent. dividend, run $2,000 to surplus & leave remainder in undivided profits.

Upon motion of Mr. Stuart the old officers were elected unanimously.

Meeting adjourned.

C. W. MOSHER, *P't.*

200 Ex. 34—E. H. 66.

Copy.

Directors' Meeting.

Held at office of bank July 12, '92, at 8 o'clock; present, R. O. Phillips, A. P. S. Stuart, E. P. Hamer, C. W. Mosher, C. E. Yates.

Upon report of president that there had been earned net in previous six months $14,026.81, it was moved & seconded that a dividend of 4 per cent. be declared & 2,000 added to surplus ac.

Meeting adjourned.

C. W. MOSHER, *P't.*

Ex. 35—E. H. 67.

Copy.

Directors' Meeting.

At special meeting of directors, held Feb. 20, '92, there *was* present A. P. S. Stuart, E. P. Hamer, C. E. Yates, D. E. Thompson, R. O. Phillips, R. C. Outcalt, C. W. Mosher.

Upon motion of Mr. D. E. Thompson, E. P. Hamer was put upon the discount committee in place of W. W. Holmes, deceased.

Under date of Feb. 16, '92, a communication was received from the comptroller regarding some matters pertaining to the bank's affairs, & a full, explicit reply was made thereto, under date of Feb. 20, '92, & signed by each director.

After further discussion of the affairs of the bank meeting adjourned.

C. W. MOSHER, *P't.*

Ex. 36—E. H.

C. W. Mosher, pres't; H. J. Walsh, vice-pres't; R. C. Outcalt, cashier

Capital National bank.

Capital, $300,000.

LINCOLN, NEB., *Jan.* 22, 1893.

Copy.

Special meeting of directors of bank, held at 3 o'clock Jan. 22, '93.

201 Present: Walsh, Hamer, Outcalt, Yates, Mosher.

Upon motion of Mr. Yates it was resolved to turn the bank over into the hands of the Comptroller of Currency & seconded by Mr. Hamer.

Upon motion of Walsh meeting adjourned.

C. W. MOSHER, *P't.*

Ex. 37—E. H.

Ex. 38—E. H.

519,600.00

Bills Receivable of the Capital National Bank.

		Good.	Doubtful.	Worthless.
131174	Altschuler, Alex.....	500 00		
132011	Ayers, F. J., & Co.....	.....	651 30	
133051	Anderson, Enoch.....	.....	40 00	
133028	Abbott & Baurmister...	200 00		
133016	Anderson, Wm.....	.....	251 94	
46757	Allen, Andrew...	.....	330 00	

		Good.	Doubtful.	Worthless.
122000	Allemand, A.....	162 50		
135007	Ayers, F. J., & Co.....	.....	126 00	
131050	Bowerman, Geo. E.....	.....	.....	400 00
131200	Bell, O. C.....	1,000 00		
131183	Brooks, L. P.....	20 00		
131120	Blomstrum, L. O.....	125 00		
131128	Beckman, F., & Co.....	150 00		
132143	Bayard & Guerin.....	60 20		
132059	Bowers, Annie E.....	100 00		
132063	Boetcher, Wm.....	100 00		
132069	Bent, O. W..	200 00		
132118	Birdsall, E. H.	150 00		
132025	Becker, E. A.....	50 00		
132002	Brady, Wm.....	.....	170 60	
132108	Bayard & Guerin... ...	78 90		
133026	Bun, D..... ..	.....	20 00	
133023	Blomstrum, Nels.....	100 00		
133077	Birdsall, E. H.....	150 00		
133085	Beardsley, S. W.....	.....	100 00	
133027	Brownell, S.....	200 00		
133043	Briggs, J. H.....	100 00		
134027	Bates, Herbert...	150 00		
134024	Briggs, Thos.....	100 00		
134060	Barron & Brdsky.....	100 00		
202				
134074	Barron, Jno. M.....	100 00		
134031	Bushboom, A.....	100 00		
1039	Brantz, Annie C.....	170 87		
50156	Bill, C. C.....	2,000 00		
131119	Blonstrum, Nels.....	70 00		
122009	Cotton, Jno. M...	.....	. ....	150 00
131191	Com'l State bank.....	2,000 00		
131154	Crandall, C. N.....	206 00		
131098	Cobb, M. M.....	300 00		
132058	Chappell, I. W.....	100 00		
132046	Castor, J. W.....	100 00		
132083	Carlson, Jno. C...	70 00		
132109	Calkins, C. C.....	60 00		
132086	Cook, Tom M.....	.....	100 00	
132092	Cook, Tom M.....	100 00		
132095	Carpenter, C. M.....	150 00		
132049	Chester, Emma.....	.....	40 00	
132145	Carter, J. O.....	140 00		
153036	Courtright, L. J.....	.....	80 00	
133030	Clark, J. H.	125 00		
133088	Culbertson, G. J.....	125 00		
133060	Coppinger, Thos.... ...	100 00		
133125	Sarothers, T. A..	300 00		

		Good.	Doubtful.	Worthless.
131131	Caldwell, Jas. L.....	.....	50 00	
113033	Crampton, D. J.....	35 00		
134034	Carpenter & Beelsfeldt..	200 00		
134065	Camp Bros.....	250 00		
134048	Chapin, E. H.....	25 00		
133010	Courtney, D. G.....	450 00		
121164	Dyer, Carl.....	53 73		
132068	Davis, O. P.....	200 00		
133124	Dennis, W. R., & Co....	300 00		
134075	Dee, John.....	50 00		
134053	Dullentry, M.....	100 00		
134079	Dennis, W. R., & Co....	1,000 00		
132029	Eddy, A....	200 00		
132140	Erskine, H. N.....	100 00		
133082	Ensign, F. W.....	50 00		
134055	Emerson, H.	500 00		
134041	Evarts, Frank L.....	200 00		
134080	Ensign, Gran.....	5,000 00		
134076	Ensign, Gran.....	1,500 00		
132107	Farr, W. H.....	30 00		
133053	Ferris, J. E.....	50 00		
133017	Furr, C. S.....	150 00		
133072	Funck, I. W.....	125 00		
203				
134036	Flynn, Mary..	200 00		
134073	Fury, Chas.....	.....	60 00	
1241	Frank, Lizzie K.....	456 00		
1242	Frank, Lizzie K	438 00		
1243	Frank, Lizzie K.....	520 00		
135009	Furr, C. S.....	100 00		
50158	Funke, Rosa.....	600 00		
131188	Greenameyer, A.....	20 00		
131158	Graham, D. L.....	50 00		
132017	Goldwater, H.....	150 00		
132067	Gates, O. C..... ...	100 00		
132099	Gleeson, A. L...	.....	100 00	
132134	Gruetter, A. T., & Co....	333 15		
133055	Greenameyer, Geo.....	75 00		
133052	Gillespie, E. B.....	30 00		
133092	George, J. W.....	.....	100 00	
134071	Greenameyer, Geo. W..	75 00		
134050	Gesford, E. K..... .	35 00		
134042	Gould, S. L.....	50 00		
132123	Greenameyer, A.....	50 00		
122060	Hamilton, W. S... ...	.....	250 00	
122143	Houtz, W. H..... ...	10 00		
2024	Hurlbutt, E., Sr.....	53 75		
131102	Hawley, C. G...	150 00		
131190	Humphrey, A. R.....	125 00		

		Good.	Doubtful.	Worthless.
131096	Hargreaves, W. B.....	200 00		
131187	Hale, James B.....	1,050 00		
132138	Hopkins, Dan.....	240 00		
132061	Horton, A. J.....	30 00		
132097	Humphrey, A. R.....	50 00		
132147	Honeywell, J. K.....	1,000 00		
133031	Higgins, Jno. P.....	83 00		
133076	Hohmann, Paul C.....	.....	30 00	
133024	Hammell, Zack.....	200 00		
133025	Hosford, F. M.....	100 00		
133029	Hollowell, Joseph.....	.....	120 00	
133044	Hadley, J. J.....	100 00		
133074	Hyde, Thos. H.....	75 00		
133081	Hyde, E. B.....	.....	150 00	
134031	Hosford, F. M.....	100 00		
134068	Hall, Chas. L.....	1,000 00		
134064	Hammell, Zack.....	500 00		
134031	Howe, Church.....	500 00		
134078	Hammell, Zack.....	200 00		
136011	Harris, J. W.....	.....	1,891 50	
204				
135008	Hopkins, Wm.....	50 00		
50124	Hill, J. E	5,000 00		
131094	Harrison, Joseph.....	40 00		
120104	Jones, S. S.....	65 00		
131090	Johnson, G. A. L.....	100 00		
132043	Johnson, I. H.	150 00		
132115	Johnson, T. H.....	114 77		
132134	Johnson, J. C.....	50 00		
133049	Johnson, John.....	100 00		
133106	Jordan, J. W.....	.....	100 00	
134069	Johnson, J. C.....	200 00		
134030	Jobson, B.....	20 00		
132050	Johnson, I. E., & Co....	24 34		
131173	Keel, H. W.....	50 00		
131148	Klausner, John.....	50 00		
132060	Knowlton, C. M.....	75 00		
132112	Kleutsch, J. D.....	150 00		
133103	Kelsey, Jno. W.....	100 00		
134019	Kirkpatrick, W. C.....	100 00		
134001	Kelso, Clara J.....	200 00		
50133	Kelly, James.....	50 00		
132032	Lickliter, Jno. W.....	50 00		
132071	Love, Will. H.....	200 00		
132074	Lowrey, T. B.....	100 00		
132087	Leavitt.....	150 00		
132090	Leese, Walter A.....	100 00		
132023	Lehman, J. M.....	25 00		
133035	Link, C. F.....	125 00		

		Good.	Doubtful.	Worthless.
133068	Lehman, J. M.....	100 00		
133101	Laws, G. L.....	200 00		
134020	Lane, W. C.....	.....	100 00	
134028	Lane, W. C.....	.....	200 00	
134044	Leavitt, L.....	100 00		
131132	Latham, John W.....	.....	.....	2,028 00
120010	Maul, Jno. P...	77 30		
121001	Miller, J. C.....	100 00		
131185	Moore, S. E.....	500 00		
131151	McBrien, Wm....	100 00		
132054	Meyers, Hermann H...	.....	150 00	
132039	McNeal, B. F.....	200 00		
132123	Meese & Doran.....	100 00		
132136	McIntosh, Jno....	200 00		
133104	Manchester, A. L.....	50 00		
133116	Meyer, L. H.....	100 00		
134018	Miller, C. H.....	100 00		
205				
134077	Magoon, Chas. E.....	700 00		
132026	Owen, F. J..... ...	150 00		
132015	Odbert, J. A....	250 00		
133079	O'Connell, John... ...	50 00		
134045	O'Connell, John.....	100 00		
134025	Orcutt, J. E...	150 00		
135000	Opp, Phillip.....	250 00		
50640	Outcalt, R. C.....	.....	... ..	$15,000
50639	Outcalt, R. C....	.....	... ..	12,500
50649	Outcalt, R. C.....	.....	.....	14,166 66
50630	Outcalt, R. C.....	.....	.....	6,240 00
50629	Price, W. C.....	.....	50 00	
132042	Paine, Phelps.....	50 00		
132030	Parke, C. M.....	150 00		
132125	Preston, A. G.....	200 00		
132070	Paine, Phelps.....	75 00		
133113	Pound, A. L.....	50 00		
1225	Price, Wm....	.....	250 00	
1226	Price, Wm.....	.....	260 00	
122136	Roose, F. F.....	224 05		
122110	Rickner, E. A.....	50 00		
131135	Reilly, Sarah C.... ...	75 00		
133069	Rinesmith, J. A.... ..	35 00		
133057	Roberts, W. G.....	125 00		
133118	Eitchey, I. P....	125 00		
134052	Reed, James.....	50 00		
136004	Reed, James.....	50 00		
135003	Rivetts, R..... .	100 00		
131067	Schmidt, Herman.....	75 00		
131150	Scanlan, J. M.....	.....	200 00	
131101	Scott, H. M.....	75 00		

		Good.	Doubtful.	Worthless.
131081	Stuart, J. M.....	150 00		
131063	Schweiger, F.....	160 00		
131121	Sickle, B.....	35 00		
132038	Safford, H. F.....	.....	200 00	
132103	Smith, Alva.....	.....	210 00	
132105	Skinner, Geo. B.....	200 00		
132035	Smith, Geo..... ...	100 00		
132057	Safford, H. F.	... ..	100 00	
133047	Schoenverg, A.....	50 00		
133102	Smith, Geo.....	50 00		
133039	Swan, Joseph.....	.....	.....	100 00
133062	Swan, Joseph.....	.....	.....	100 00
133073	Speltz, Jno. R...	100 00		
206				
133080	Stanton, David...	150 00		
133089	Sipp, Andrew...	200 00		
133110	Smith, James W.....	200 00		
134066	Spelts, Jno. R.....	44 00		
134049	Safford, H. F.....	... ..	150 00	
134070	Sansom, A. R.....	200 00		
131104	Scott, Milton.....	75 00		
122088	Tuttle, S. J.....	100 00		
131164	Tuttle, S. J.....	100 00		
132064	Townley, R. H.... ...	250 00		
133046	Thompson, F. D.....	100 00		
134035	Taylor, G. B.....	200 00		
134022	Tyler, James, Jr.....	44 00		
132146	Upham, Lillian.....	30 00		
132101	Van Buskirk, J. R.....	190 07		
134026	Vogt, A.....	200 00		
117135	Wynn, W. S.....	.....	100 00	
131181	White, F. L.....	.....	50 00	
131137	Waters, F. R.....	.....	56 25	
131106	Waters, Frank R.....	.....	230 00	
134044	Witsel, Geo.....	.. ..	50 00	
132031	Westcott, M. H.....	100 00		
133078	Wenzel, W. J.....	30 00		
133020	Whitehead, Rich'd.....	100 00		
133126	Waggoner, J. A.....	25 00		
133128	Whedon, Chas. O.....	300 00		
134058	Waters, F. R.....	.....	50 00	
134059	Waters, F. R.....	.....	50 00	
134072	Watson, J. A.....	200 00		
122031	Whitmore, J. A.....	... ..	622 95	
135001	Wiltsee, O. E.....	.....	175 00	
133091	Young, Sam'l.....	125 00		
122138	Bowerman, G. E.....	.....	.....	100 33
132141	Betts, Bert E..... .	.....	65 00	
46736	Bailey, Jas. A.....	.....	.....	50 00

		Good.	Doubtful.	Worthless.
1252	Bellairs, G. V.	120 00		
1262	Bernard, Chas. F.			300 00
1263	Bernard, Chas. F.			150 00
1264	Bernard, Chas. F.			150 00
1265	Bernard, Chas. F.			150 00
1266	Bernard, Chas. F.			150 00
1267	Bernard, Chas. F.			150 00
1268	Bernard, Chas. F.			150 00
1269	Bernard, Chas. F.			150 00
1270	Bernard, Chas. F.			150 00
1272	Bernard, Chas. F.			150 00
1273	Bernard, Chas. F.			200 00
122008	Cook, Tom M.		250 00	
207				
1260	Caywood, Jas.		50 00	
1164	Clabby, C. A.		75 35	
1248	Collins, J. S.	216 00		
1249	Collins, J. S.	232 00		
4621	Cunningham, Ed		64 00	
2020	Drath, L.		70 00	
2021	Drath, L.		70 00	
1229	Evert-, Geo. K.		300 00	
1230	Everts, Geo. K.		200 00	
1228	Everts, Geo. K.		200 00	
1231	Everts, Geo. K.		300 00	
132053	Fisher, Annie R.	225 00		
133038	Fawell, J. H.		150 00	
133119	Fraser, Rellah		153 90	
4617	Farrell, E.	17 00		
132102	Gilbraith, F. H.	100 00		
133022	Grimes, H. H.		50 00	
134061	Gillespie, Sarah D.	30 00		
134054	Gardner, W. A.		250 00	
132131	Hawley, C. G.		500 00	
133130	Hood, J. D.		500 00	
2077	Hess, G. J.		407 06	
2067	Hess, G. J.		353 97	
2079	Hidebaugh, G. W.		380 03	
4618	Harder, John	20 00		
2068	Hess, G. J.		363 98	
2019	Jordan, J. C.		243 76	
3139	Johnson, Jno. S.	110 00		
1232	Johnson, Jno. A.		100 00	
1236	Johnson, Jno. A.		100 00	
1234	Johnson, Jno. A.		136 00	
1235	Johnson, Jno. A.		100 00	
1236	Johnson, Jno. A.		100 00	
1237	Johnson, Jno. A.		100 00	
1238	Johnson, Jno. A.		100 00	

		Good.	Doubtful.	Worthless.
1239	Johnson, Jno. A.....	.....	1,100 00	
1222	Kline, Sam'l C.....	453 50		
4612	Kleim, Chas.....	... ..	35 00	
3137	Keedle, T. B...	.....	242 75	
4616	Kelley, Jno. P.	41 00		
39167	Marsh & Hinds	.....	1,000 00	
120142	Morrissey, Frank R. ..	.....	50 00	
121044	Morrisey, Frank R.....	.....	50 00	
50632	Mosher, C. W....	.....	1,000 00	
2069	Miller Bros.....	.....	229 83	
208				
132000	Mosher, C. W.....	.....	.....	1,948 33
132072	Meyer, H. M.....	.....	150 00	
132110	Maxon, J. K.....	35 00		
133048	Mauritius, M. B.....	.....	100 00	
133070	Martin, D.....	.....	103 40	
1257	Mustain, T. C.....	... ..	250 00	
50633	Mosher, C. W.....	.....	.....	5,000 00
95021	Marshall, Elliot.....	.....	5,832 00	
50636	Mosher & Outcalt	.....	.....	5,635 00
50637	Mosher, C. W.....	.....	.....	5,000 00
50644	Mosher, C. W.....	.....	.....	5,000 00
46448	Miller Bros.....	.....	.....	229 83
2070	Miller Bros..... ...	.....	.....	229 83
50642	Mosher, C. W.....	.....	.....	20,000 00
50643	Mosher, C. W.....	.....	... ..	20,833 34
50638	Mosher, C. W.....	... ..	.....	17,500 00
134014	Marsh, James.....	... ..	.....	200 00
46756	Opelt, Alfred	.....	60 00	
122100	Palmer, A. Z..... .	.....	.....	55 00
131068	Palmer, A. Z.....	. ....	.....	100 00
13110	Pardee, James B.....	.....	100 00	
132075	Roberts, W. G...	200 00		
1261	Russell, A. C.....	100 00		
135004	Redding, M. A.....	50 00		
1259	Rider, Jno. W.....	... ..	80 00	
1258	Rider, Jno. W.....	.....	50 00	
2018	Sloan, W. T.....	.....	233 35	
2013	Smith, J. V.	.....	105 15	
2078	Sloan, W. T.....	.....	436 48	
4620	Silvers, C.....	18 00		
46735	Scott, Mary C..... .	... ..	.....	6,500 00
46734	Scott, Mary C.....	.....	.....	6,500 00
4619	Schall, Lewis	115 00		
3136	Sorenson, Jens	150 00		
3135	Tipton, E. P..... ..	.....	58 00	
3136	Tipton, E. P.....	... ..	73 00	
133127	Vaughn, W. R.....	.....	.....	80 00
2081	Wheeler, Wallace	.....	.....	891 33

		Good.	Doubtful.	Worthless.
131092	Yeoman, B. C.		38 20	
120081	Askin, H.			100 00
116078	Barstow, W. H.			50 00
116107	Barstow, W. H.			100 00
132019	Beahm, A. W.			65 00
39139	Bond, M. Isabella			291 35
1165	Barstow, W. H.	1,508 00		
1199	Barstow, W. H.			1,130 75
117001	Cameron, A. T.			603 80
209				
133050	Darnell, J.			51 50
80047	Edwards, J. M.			75 50
2074	Echart, Jno. A.			150 00
111053	Falkenberg, F. A.			2,041 00
1240	Frank, M. C.			2,120 00
2073	Grieb, H. L			37 50
91106	Haber, Jno. H.			70 00
120109	Hefner, O. O.			1,300 00
120141	McKeighan, W. A.			200 00
2072	McGee, M. F.			75 00
122011	March, C. W. & W. W.			3,600 00
122012	Marsh Binder Mfg. Co.			9,000 00
131000	Mosher, E. W.		5,000	
131001	Mosher, E. W.		5,000	
131002	Mosher, E. W.		5,000	
131003	Mosher, E. W.		5,000	
1221	Meagher, Mary A.			250 00
134007	Mosher, E. W.		12,730 01	
134008	Mosher, E. W.		10,600 00	
134009	Mosher, E. W.		8,611 20	
134010	Mosher, E. W.		5,000 00	
134011	Mosher, E. W.		5,000 00	
136005	Mosher, E. W.		2,500 00	
1220	Meagher, Mary A.			4,301 40
50101	Mosher, E. W.		5,903 77	
50102	Mosher, E. W.		5,505 68	
50103	Mosher, E. W.		5,623 70	
50104	Mosher, E. W.		4,307 28	
50105	Mosher, E. W.		2,458 77	
50106	Mosher, E. W.		6,000 00	
50108	Mosher, E. W.		6,881 18	
50109	Mosher, E. W.		5,963 86	
1183	Nixon, Eli			137 81
1184	Nixon, Eli			175 41
1185	Nixon, Eli			331 21
1186	Nixon, Eli			438 00
39162	Pratt, W. J.			42 00
39173	Pratt, W. J.			50 00
131022	Roose, F. F.			500 00

		Good.	Doubtful.	Worthless.
122010	Sycamore Marsh Harvester Co.	.....	.....	4,500 00
131141	Sharrar, W. A.	.....	.....	50 00
132014	Smith, O. C.	.....	.....	105 90
46665	Sharrar, W. A.	.....	.....	7,103 76
210				
122015	Furk, C. E.	.....	.....	7,289 10
132094	Thayer, Jno. M., Jr.	.....	.....	150 00
131160	Thayer, Jno. M.	.....	.....	2,228 43
122018	Western Mfg. Co.	.....	.....	5,000 00
122016	Western Mfg. Co.	.....	.....	5,000 00
131017	Western Mfg. Co	.....	.....	5,000 00
132012	Western Mfg. Co.	.....	.....	5,000 00
132009	Western Mfg. Co.	.....	.....	5,000 00
132009	Western Mfg. Co.	.....	.....	5,000 00
132010	Western Mfg. Co.	.....	.....	5,000 00
133009	Western Mfg. Co.	.....	.....	5,000 00
133011	Western Mfg. Co.	.....	.....	5,000 00
	Ex. 39—E. H.			
133012	Western Mfg. Co.	.....	.....	5,000 00
133013	Western Mfg. Co.	.....	.....	5,000 00
133015	Western Mfg. Co.	.....	.....	5,000 00
134002	Western Mfg. Co.	.....	.....	5,000 00
134040	Western Mfg. Co.	.....	.....	5,000 00
130439	Western Mfg. Co.	.....	.....	5,000 00
134038	Western Mfg. Co.	.....	.....	5,000 00
136000	Western Mfg. Co.	.....	.....	5,000 00
136001	Western Mfg. Co.	.....	.....	5,000 00
136002	Western Mfg. Co.	.....	.....	5,000 00
136003	Western Mfg. Co.	.....	.....	5,000 00
136008	Western Mfg. Co.	.....	.....	5,000 00
136010	Western Mfg. Co.	.....	.....	5,000 00
137002	Western Mfg. Co.	.....	.....	5,000 00
137001	Western Mfg. Co.	.....	.....	5,000 00
137003	Western Mfg. Co.	.....	.....	5,000 00
		49,665 06	141,311 27	328,543 67

$141,011.44, bills receivable.

Bills Receivable of the Capital National Bank, Shown by the Books, but Not on Hand.

No.	Name.	Discounted by bank.	Maturity.	Amount.
4502	J. D. Smith	Dec.	4, 1891.	$400 00
4512	Nelson Peters	Jan.	1, 1892.	300 00
4513	W. W. Taylor	Jan.	2, 1892.	109 00
4514	W. E. Wilber	Jan.	3, 1892.	130 00

No.	Name.	Discounted by bank.	Maturity.	Amount.
4517	N. Hartsock		Jan. 4, 1892.	23 33
4519	A. K. Anderson		Jan. 5, 1892.	29 00
211				
4520	W. Paulson		Jan. 5, 1892.	106 00
4521	Patrick Tierney		Jan. 6, 1892.	300 00
4523	C. W. Kastersen		Jan. 8, 1892.	114 25
4528	N. Hartsock		Jan. 9, 1892.	117 35
4532	M. Harder		Jan. 13, 1892.	282 85
4533	Pat. Murphy		Jan. 14, 1892.	470 00
4536	Geo. M. Montgomery		Jan. 17, 1892.	200 00
4537	Oscar Buck		Jan. 17, 1892.	155 00
4538	S. T. Stephenson		Jan. 18, 1892.	389 00
4544	Dan. I. Weidner		Jan. 25, 1892.	57 50
4547	T. Erskine		Jan. 28, 1892.	389 00
4550	J. I. Ecker		Jan. 28, 1892.	36 50
4552	Allen McKenzie		Feb. 6, 1892.	300 00
4553	P. Farrell		Feb. 6, 1892.	300 00
4554	Robert B. Cato		Feb. 7, 1892.	50 00
4555	B. M. Howard		Feb. 8, 1892.	240 00
4558	O. E. Walters		M'ch 27, 1892.	602 70
4559	O. E. Walters		M'ch 27, 1892.	602 75
4564	Allen McKinzie		M'ch 29, 1892.	500 00
4767	Edw. Poppin		Apr'l 18, 1892.	215 00
4571	Wm. Farran		May 27, 1892.	149 20
4572	John Peterson		July 15, 1892.	169 60
4574	Ed. Hughes		July 28, 1892.	111 85
4577	Crine Packard		June 8, 1892.	210 40
4578	Walter Havens		June 14, 1892.	255 60
4579	W. B. Johnson		June 10, 1892.	20 30
4581	W. Evans		June 13, 1892.	100 00
4582	Walt Haven		June 18, 1892.	89 71
4583	A. J. Runion		Oct. 10, 1892.	36 65
4584	A. J. Runion		Oct. 23, 1892.	46 75
4585	A. J. Runion		Oct. 25, 1892.	123 50
4588	M. Barnhardt		July 1, 1892.	163 25
4589	M. G. Curtis		July 1, 1892.	69 65
4590	J. H. Meyers		July 17, 1892.	289 20
4593	M. H. Kelley		Aug. 4, 1892.	300 00
4595	J. W. Farley		Aug. 10, 1892.	18 00
4696	Wm. Farrow		Aug. 13, 1892.	34 95
4597	Wm. Farrow		Aug. 16, 1892.	248 16
4598	Pat. Cunningham		Aug. 17, 1892.	119 45
4599	J. J. Townsend		Aug. 13, 1892.	33 00
4600	Patrick Kelley		Aug. 17, 1892.	329 90
4603	P. F. McAininch		Aug. 25, 1892.	118 00
4604	M. J. Ryan		Sep. 12, 1892.	345 35
212				
4605	J. L. Wheeler		Sep. 22, 1892.	47 00

No.	Name.	Discounted by bank.	Maturity.	Amount.
4607	Wm. Farrow		Nov. 16, 1892.	248 17
4608	John Johnson		Jan. 1, 1893.	40 00
4610	B. M. Umphress		Jan. 1, 1893.	70 00
4614	J. W. Ammerman		Jan. 4, 1893.	10 00
4615	Sam. I. F. Weidner		Jan. 4, 1893.	10 00
41623	J. & V. Allison		Jan. 4, 1889.	175 80
46267	David Hatchet		Sep. 26, 1889.	132 00
46268	S. H. Douglass		Sep. 28, 1889.	132 00
46269	J. W. Stenson		Sept. 28, 1889.	132 00
46273	J. J. Reeves		Sept. 28, 1889.	132 00
46270	Chas. Reeves		Oct. 8, 1889.	132 00
46275	J. N. Sheivell		Oct. 3, 1889.	132 00
46276	Chas. Hobson		Oct. 4, 1889.	132 00
46277	Chas. Hobson		Oct. 4, 1889.	132 00
46278	E. R. Hay		Oct. 12, 1889.	132 00
60074	Thos. McDonald		Oct. 10, 1889.	475 90
80037	J. B. Allison		Oct. 4, 1890.	413 00
81026	N. & P. Johnson		Nov. 1, 1890.	39 30
94209	Henry Hurlbut		April 1, 1891.	122 10
94211	M. W. & H. Hurlbut		Apr. 1, 1891.	260 95
94241	Robert Radford		Apr. 1, 1891.	102 75
94243	L. Whitesel		Apr. 15, 1891.	4 20
96217	Ben. Benson		June 1, 1891.	359 95
96256	W. D. Hart		June 1, 1891.	8 00
96257	Rob't B. Branch		Oct. 4, 1891.	21 75
96258	H. Majorian		Oct. 4, 1891.	66 60
96259	Chas. G. Naits		Oct. 4, 1891.	594 45
3044	D. H. Mathews		July 1, 1891.	11 00
3050	P. Anderson		Aug. 1, 1891.	25 70
3052	F. Smith		Sept. 1, 1891.	52 80
3058	Geo. Moon		Sept. 15, 1891.	6 25
3059	A. Munson		Sept. 1, 1891.	73 00
3067	E. P. Matson		M'ch 5, 1892.	22 50
3072	Pat. Moran		Oct. 1, 1892.	212 80
3074	W. H. Mendenhall		Jan. 1, 1893.	220 00
3078	H. Deitrich		Jan. 1, 1891.	28 65
3080	H. Deitrich		Jan. 1, 1891.	19 60
3083	Andrew Schmidt		Oct. 15, 1891.	14 50
3086	L. M. Hurlbut		Oct. 1, 1891.	56 15
3089	John Tubbs		Oct. 1, 1891.	160 55
3091	J. F. Carroll		Oct. 20, 1891.	33 35
3097	N. L. M. Miller		July 1, 1892.	34 00
3098	Wm. Huffeldt		Oct. 1, 1892.	139 55
213				
3099	John D. Johnson		Oct. 1, 1892.	337 00
3103	G. D. Nutt		Nov. 1, 1891.	21 95
3104	A. G. Blakeman		Oct. 1, 1892.	15 00
3105	T. H. Yale		Nov. 1, 1892.	208 30
3107	C. Radford		June 1, 1892.	90 60

No.	Name.	Discounted by bank.	Maturity.	Amount.
3108	C. H. Rohder		Sept. 1, 1892.	50 00
3111	H. C. Christenson		Oct. 20, 1892.	150 00
3112	R. B. Branch		Nov. 1, 1892.	209 10
3113	R. A. Welts		Nov. 1, 1892.	27 50
3114	R. A. Welts		Nov. 1, 1892.	467 00
3116	Carl Holst		Oct. 1, 1892.	100 00
3118	John P. Johnson		Oct. 1, 1892.	43 20
3120	Loren Warren		June 4, 1892.	600 00
3121	Robert Taylor		Aug. 1, 1892.	68 00
3122	C. Rasmusser.		Oct. 1, 1892.	39 15
3123	Edward Krick		Oct. 3, 1892.	473 00
3124	H. Anderson		Oct. 1, 1892.	57 70
3125	Swan Larsen		Sept. 1, 1892.	27 00
3126	L. M. Radford		Oct. 1, 1892.	375 00
3126	Dan. McCurdy		Oct. 1, 1892.	404 00
3129	J. B. Woodard		Dec. 27, 1892.	58 50
3131	B. Moran		Jan. 1, 1893.	9 55
3132	Allen Whitzell		Jan. 1, 1893.	48 35
3133	C. A. Mitchell		Feb. 21, 1893.	25 00
15726	W. Dwyer		Oct. 1, 1887.	237 50
40227	P. E. Haines		Nov. 4, 1888.	112 46
40770	H. W. Holman		Dec. 19, 1888.	456 75
41712	P. E. Haines		Jan. 1, 1889.	129 52
41988	T. P. Owen		Jan. 6, 1889.	226 90
43223	T. P. Owen		M'ch 8, 1889.	219 62
45463	H. B. Gue		June 26, 1889.	107 20
46245	M. K. Neville		Aug. 4, 1889.	327 50
46264	P. E. Haines		Oct. 4, 1889.	333 33
72197	A. C. Graves		Feb. 1, 1890.	160 00
75002	M. Heinrich		May 1, 1890.	264 60
75003	M. Heinrich		May 1, 1890.	203 20
75094	L. G. Fees		May 1, 1890.	298 40
75218	C. E. Farstburg		May 1, 1890.	171 85
77001	W. M. Cowell		July 29, 1890.	110 00
78032	C. C. Epps		Aug. 4, 1890.	165 46
80006	Wm. Muchmore		Oct. 1, 1890.	50 00
80089	O. M. Miller		Oct. 1, 1890.	78 22
81051	Chas. Green		Nov. 1, 1890.	631 33
214				
81052	Chas. Green		Nov. 1, 1890.	631 33
81061	O. M. Miller		Nov. 1, 1890.	118 27
91096	O. M. Miller		Jan. 1, 1891.	333 35
93012	J. S. Preitt		M'ch 1, 1891.	172 00
94186	W. H. Barstow		Apr. 29, 1891.	306 20
96015	R. Flouer		June 1, 1891.	23 37
96023	Geo. Hunter		June 12, 1891.	22 50
96037	J. W. Underhill		June 1, 1891.	600 00
96231	Chas. Green		June 8, 1891.	37,95
81003	Louis Lesh		Nov. 9, 1890.	548 45

No.	Name.	Discounted by bank.	Maturity.	Amount.
1033	James Powers		Aug. 11, 1892.	161 07
1035	Wm. McDonald		Oct. 1, 1892.	120 42
1038	A. C. Brantz		June 4, 1893.	160 37
1041	W. H. Brooks		M'ch 4, 1892.	270 00
1042	N. Elliott		July 10, 1891.	355 24
1047	H. Harding		July 19, 1891.	73 32
1057	H. & J. Fountain		Aug. 1, 1891.	13 85
1059	C. A. & J. B. Clabby		Apr. 4, 1892.	97 50
1060	Thos. Jones		Apr. 10, 1892.	560 00
1061	W. H. Barstow		Apr. 5, 1892.	1,080 00
1068	M. Ross		Sept. 1, 1891.	397 20
1069	C. H. Fisher		Sept. 21, 1891.	180 00
1070	R. Flouer		Sept. 4, 1891.	4 43
1074	R. E. Meagher		Sept. 4, 1891.	481 41
1080	E. H. Underhill		Sept. 3, 1891.	18 25
1106	J. W. Underhill		Oct. 21, 1891.	672 05
1109	M. & R. Ross		Oct. 1, 1891.	61 65
1110	J. W. Comfort		Oct. 4, 1891.	31 30
1112	J. B. Trickey		Oct. 7, 1891.	62 70
1120	J. Donovan		Oct. 18, 1891.	69 15
1121	W. A. Meagher		Oct. 4, 1891.	899 48
1123	C. E. Van Dusen		Oct. 18, 1891.	521 65
1125	Thos. Jones		Apr. 4, 1892.	508 15
1130	C. F. Leslie		Nov. 4, 1892.	118 90
1131	Annie C. Brantz		Dec. 16, 1892.	535 70
1136	W. H. Barstow		Nov. 4, 1891.	523 55
1137	Louis Lesh		Nov. 4, 1891.	117 80
1145	Rob't Flouer		Dec. 4, 1891.	85 20
1152	Chas. W. Pittman		Jan. 4, 1892.	37 69
1153	W. H. Barstow		Jan. 4, 1892.	1,000 12
1158	John Foul		Jan. 3, 1892.	285 80
1159	W. J. Furman		Jan. 3, 1892.	47 55
1166	C. A. & J. B. Clabby		Oct. 4, 1893.	62 50
1167	Geo. Barton		Apr. 28, 1892.	154 20
215				
1168	W. H. Barstow		July 4, 1892.	550 22
1169	W. H. Barstow		Nov. 4, 1892.	563 55
1170	Louis Lesh		Nov. 9, 1893.	134 00
1182	Levi Nixon		June 1, 1892.	234 57
1187	N. Elliott		July 10, 1892.	707 87
1188	N. Elliott		July 10, 1893.	756 48
1189	N. Elliott		July 10, 1894.	805 29
1190	N. Elliott		July 10, 1895.	1,709 00
1191	Thos. Jones		Oct. 4, 1892.	1,626 49
1196	David Meloy		Feb. 10, 1892.	408 30
1198	W. H. Barstow		Jan. 4, 1893.	1,066 60
1200	J. W. Reeder		June 4, 1892.	46 80
1201	David Meloy		Feb. 10, 1893.	49 00
1202	W. H. Brook		M'ch 4, 1893.	290 00

No.	Name. Discounted by bank.	Maturity.	Amount.
1203	J. W. Reeder	June 4, 1893.	34 50
1204	J. W. Reeder	June 4, 1894.	31 50
1205	J. W. Reeder	June 1, 1892.	108 75
1206	J. W. Reeder	June 1, 1893.	115 75
1207	J. W. Reeder	June 1, 1894.	126 75
1208	J. W. Reeder	June 1, 1895.	1,216 56
1210	N. Elliott	Aug. 13, 1895.	492 86
1213	Eriah Wendall	Oct. 4, 1892.	125 30
1215	Henry Fry	Dec. 21, 1892.	50 00
1244	L. C. Yolan	Jan. 1, 1893.	153 00
1253	Wm. Ellis	Dec. 4, 1892.	135 17
1254	C. L. Wallace	Dec. 4, 1893.	70 00
1255	C. Layher	Jan. 4, 1893.	95 00
1256	Wm. Ellis	Apr. 4, 1893.	210 29
1050	W. S. Burch	Aug. 13, 1891.	17 00
49006	J. D. Seaman	Jan. 1, 1889.	584 63
49007	J. D. Seaman	Jan. 1, 1889.	548 28
49018	W. A. Crandall	May 27, 1889.	157 15
28728	V. Erickson	Nov. 1, 1890.	151 00
28725	W. D. Blitz	Nov. 1, 1890.	94 50
28735	E. P. Tipton	Dec. 1, 1890.	99 00
28986	E. Stephens	July 1, 1890.	171 45
29469	E. M. Wassen	Dec. 1, 1890.	150 00
150052	Joseph Lapel	Dec. 1, 1890.	112 00
150056	W. R. Chambers	Dec. 1, 1890.	111 78
95287	A. H. Harmonson	May 3, 1891.	322 63
95288	A. H. Harmonson	May 3, 1891.	67 56
41779	J. M. Siebell	Jan. 4, 1889.	100 00
43211	W. H. Sindell	M'ch 17, 1889.	129 60
216			
73006	Alice J. Keller	M'ch 1, 1890.	75 00
76001	Isaac Warrell	June 1, 1890.	27 87
77011	F. M. Cook	July 25, 1890.	75 00
78008	C. M. Hoff	Aug. 1, 1890.	18 40
80001	L. & H. Thompson	Oct. 11, 1890.	155 20
80266	H. G. Kaines	Oct. 14, 1890.	57 05
81045	John Price	Nov. 1, 1890.	41 00
81048	A. A. Watt	Nov. 1, 1890.	40 00
82001	F. B. Montgomery	Dec. 1, 1890.	62 50
82039	W. J. Crawford	Dec. 1, 1890.	205 00
82023	J. V. Espeny	Dec. 16, 1890.	35 00
82000	S. J. Elsworth	Dec. 24, 1890.	78 50
82046	Geo. Fleishousen	Dec. 1, 1890.	26 50
82085	H. Hoffaker	Dec. 1, 1890.	75 00
91138	Tom Dobson	Jan. 4, 1891.	60 00
91110	A. Kirkpatrick	Jan. 1, 1891.	67 75
91103	C. Stiger	Jan. 1, 1891.	15 75
91044	A. Canfield	Jan. 1, 1891.	106 00
91029	C. P. Mathews	Jan. 1, 1891.	110 00

No.	Name.	Discounted by bank.	Maturity.	Amount.
91008	F. Yocum		Jan. 1, 1891.	35 00
91000	C. W. Pound		Jan. 1, 1891.	7 20
93007	J. C. Wry		M'ch 1, 1891.	117 00
93206	C. D. Dixon		M'ch 17, 1891.	28 10
2005	J. C. Jordan		Sept. 3, 1892.	52 60
2015	A. H. Harmonson		Apr. 30, 1892.	408 69
2023	F. M. Snediker		July 7, 1892.	50 00
2025	Wm. Belcher		Oct. 13, 1892.	39 75
2034	Reed & Wycoff		Nov. 1, 1891.	314 13
2039	C. S. Bates		Dec. 1, 1891.	91 92
2069	Miller Bros		Jan. 1, 1893.	229 85
15703	V. Vifquain		June 1, 1887.	200 00
36595	S. E. &. J. G. Spencer		June 25, 1888.	1,200 00
15707	V. Vifquain		Aug. 1, 1887.	250 00
37235	H. M. Casebier		July 21, 1888.	418 77
39233	J. E. Vassett		Oct. 14, 1888.	88 69
39951	L. H. Kilbourn		Nov. 28, 1888.	240 13
40149	Claus Peters		Nov. 12, 1888.	200 00
60228	Willis E. Bellows		Oct. 5, 1889.	75 00
60255	J. C. Van Baskirk		Oct. 30, 1889.	2,147 05
71231	J. Tubman		Jan. 31, 1890.	100 00
72161	M. & J. Oppenheimer		Feb. 3, 1890.	65 00
73177	G. F. McDonald		M'ch 6, 1890.	150 00
75003	Alice G. Simms		May 16, 1890.	612 00
217				
78017	S. & S. Grimm		Aug. 23, 1890.	110 00
78072	J. C. Roberts		Aug. 3, 1890.	90 00
78234	J. O. Purbaugh		Aug. 23, 1890.	46 00
79285	E. S. Smithson		Sept. 3, 1890.	75 00
82032	S. L. Wright		Dec. 17, 1890.	324 00
91207	F. G. Hamer		Jan. 12, 1891.	1,000 00
91312	F. Drake		Jan. 26, 1890.	153 90
91417	D. F. Doubt		Jan. 25, 1891.	25 00
91421	S. A. Ward		Jan. 4, 1891.	18 50
91435	F. G. Hamer		Jan. 12, 1891.	1,500 00
92017	R. R. Marea		Feb. 12, 1891.	275 00
92216	H. Ramphert		Feb. 21, 1891.	37 80
94107	D. F. & L. L. Doubt		Apr. 22, 1891.	50 00
95268	E. G. McNeal		May 4, 1891.	25 00
96052	W. P. Harris		June 3, 1891.	126 10
39122	Phillip Andres		July 23, 1891.	100 00
39123	E. P. Roggen		Aug. 5, 1891.	3,182 85
39124	W. C. Crooks		Aug. 9, 1891.	300 00
39127	F. S. Granger		Aug. 28, 1891.	200 00
39129	Rose M. Bustard		Aug. 19, 1891.	60 00
39131	H. A. Seymore Mfg. Co		Aug. 16, 1891.	92 00
39134	J. E. Waite		Sept. 2, 1891.	50 00
39138	James A. Bailey		Sept. 11, 1891.	116 85
39140	J. W. Ferguson		Oct. 27, 1891.	2,135 00

No.	Name.	Discounted by bank.	Maturity.	Amount.
39145	E. S. Conner		Oct. 18, 1891.	450 00
39152	R. Sweeney		Oct. 4, 1891.	200 00
39157	J. R. & J. C. Taylor		Nov. 12, 1891.	308 82
39163	J. J. Robinson		Nov. 5, 1891.	15 00
39164	W. H. Barstow		Nov. 3, 1891.	84 00
39165	S. L. Wright		Dec. 1, 1891.	348 00
39168	H. E. James		Dec. 23, 1891.	35 35
39171	P. A. Gatchell		Jan. 15, 1892.	45 00
113096	Jas. H. Goodrich		M'ch 25, 1892.	28 00
113136	S. S. Smith		M'ch 20, 1892.	25 00
114062	S. S. Smith		Apr. 18, 1892.	100 00
115015	Geo. H. Bailey		May 14, 1892.	2,058 50
117004	John Archers		July 8, 1892.	15 00
118098	C. H. Blanchford		Aug. 19, 1892.	100 00
118118	Geo. A. Van Sickle		Aug. 10, 1892.	100 00
118165	H. A. Askin		Aug. 14, 1892.	25 00
119019	W. E. Wamack		Sept. 4, 1892.	150 00
218				
120066	Sam'l A. Chapman		Oct. 9, 1892.	150 00
120086	Robert Grant		Oct. 29, 1892.	18 70
120181	D. E. Swaney		Oct. 24, 1892.	50 00
121047	Jules Rhodes		Nov. 6, 1892.	150 00
121155	Sarah E. Brown		Nov. 22, 1892.	200 00
122064	Jerry Dunley		Dec. 3, 1892.	70 00
114070	A. A. Richardson		Apr. 20, 1892.	177 00
156000	R. McFarland		Oct. 1, 1886.	23 00
15603	Eli Wilson		Oct. 1, 1886.	72 00
15607	E. Munning		Oct. 1, 1886.	40 00
15609	A. McFarland		Oct. 1, 1886.	60 00
15611	W. F. Fitzke		Jan. 1, 1887.	55 00
15613	Jas. Geres		Jan. 1, 1887.	50 00
15617	Jas. Sperry		Nov. 1, 1886.	22 50
15618	J. Major		Nov. 1, 1886.	17 50
15619	G. T. Jones		Aug. 16, 1886.	35 00
15623	A. McFarland		May 5, 1886.	76 37
15627	D. M. Cook		June 1, 1886.	75 00
15630	Henry Hilt		June 1, 1886.	50 00
15631	John Johnson		May 3, 1887.	500 00
15632	John Johnson		May 3, 1886.	500 00
15637	K. J. Willis		Feb. 19, 1889.	140 00
15638	K. J. Willis		Feb. 19, 1888.	130 00
15639	K. J. Willis		Feb. 19, 1887.	100 00
15649	A. Dunkler		Oct. 1, 1886.	40 00
15651	A. J. Horton		July 1, 1887.	145 00
15652	A. J. Horton		July 1, 1888.	179 50
15658	John Turman		Oct. 1, 1886.	40 00
15661	J. F. Grey		Oct. 1, 1886.	72 00
15668	Randall & Meyer		Sept. 16, 1886.	1,333 34
15669	J. Ball		Jan. 1, 1887.	1,000 00

No.	Name.	Discounted by bank.	Maturity.	Amount.
15670	Ira Johnson		Jan. 1, 1888.	457 40
34899	H. Wohlenberg		April 1, 1888.	57 50
43953	H. Wohlenberg		Apr. 1, 1889.	103 00
46226	H. Wohlenberg		Apr. 1, 1890.	372 00
46401	M. A. & J. W. Small		May 29, 1891.	2,000 00
46402	M. A. & J. W. Small		May 29, 1891.	1,500 00
46403	M. A. & J. W. Small		May 29, 1891.	2,500 00
46404	M. A. & J. W. Small		May 29, 1891.	1,500 00
46405	M. A. & J. W. Small		May 29, 1891.	1,500 00
46406	M. A. & J. W. Small		May 29, 1891.	2,500 00
46407	M. A. & J. W. Small		May 29, 1891.	1,000 00
46408	M. A. & J. W. Small		May 29, 1891.	2,000 00
46409	M. A. & J. W. Small		May 29, 1891.	1,000 00
46410	M. A. & J. W. Small		May 29, 1891.	1,000 00
219				
46411	M. A. & J. W. Small		May 28, 1891.	1,000 00
46412	M. A. & J. W. Small		May 29, 1891.	1,000 00
46413	M. A. & J. W. Small		May 29, 1891.	1,500 00
25701	J. W. Small		July 1, 1887.	2,000 00
25705	J. W. Small		July 1, 1887.	2,000 00
28024	M. Dunkel		Oct. 17, 1887.	41 35
28072	E. T. Norden		Nov. 18, 1887.	140 00
28073	H. C. Masterson		Nov. 9, 1887.	73 50
28074	I. L. Masterson		Nov. 26, 1887.	35 00
15706	J. W. Small		July 1, 1887.	1,000 00
36950	Mary A. Small		July 15, 1888.	207 57
49092	Ada Fogg		June 25, 1888.	225 00
49955	Mary & J. W. Small		Nov. 29, 1888.	786 66
39967	M. Dunkel		Nov. 26, 1888.	105 25
46244	Mary A. Small		July 15, 1889.	661 33
46210	Mary A. & J. W. Small		Nov. 29, 1889.	786 67
74011	H. B. Kirkpatrick		Apr. 23, 1890.	310 20
74019	A. P. Reynolds		Apr. 23, 1890.	27 00
74035	T. J. Kemp		Apr. 23, 1890.	13 35
50110	J. Frederick		Demand	20 00
50115	Rewick Bros. & Co.		Demand	4,000 00
50116	M. D. Reynolds		Demand	310 87
50117	M. Niller		Demand	874 60
50118	C. W. Gibson		Demand	355 50
50119	C. W. Gibson		Demand	526 89
50120	C. W. Gibson		Demand	555 15
50121	Joel K. Scott		Demand	884 65
50123	W. R. Miller		Demand	613 15
50122	S. F. Reynolds		Demand	317 34
49091	E. F. Martin		May 27, 1888.	900 00
49094	E. L. Martin		Aug. 23, 1888.	620 00
49105	J. W. Walters		Oct. 11, 1888.	715 00
49116	D. D. Spail		Nov. 17, 1888.	540 25
49185	W. E. Hunt		May 18, 1888.	236 25

No.	Name.	Discounted by bank.	Maturity.	Amount.
49130	J. R. Little.....		Jan. 1, 1889.	260 40
49166	Fairmont Hotel Co.....		Apr. 4, 1889.	357 61
49147				
78011	First National bank, Fairmont.		Aug. 23, 1890.	2,436 73
	Hogue judgment			14,854 00
	Insurance judgments.....			3,358 00
				141,011 44

220

EXHIBIT 40—E. H.

(Copy.)

Babbit's Certificate of Deposit Register.

Date.	Deposited by—	Number.	Amount.	Total.	Date paid.	Payable to—
1891.						
Aug. 17.	Collections.	25097	50			

Ex. 41—E. H. *[No. 4.]

(Copy.)

Capital National Bank.

Interest at — if left — months. No interest after maturity.

$50,000.00. LINCOLN, NEB., *Aug.* 17, 1891.

J. E. Hill, treas'r, has deposited in this bank fifty thousand dollars payable to the order of self on return of this certificate properly endorsed.

No. 25097. C. W. MOSHER, *P't.*

Not subject to check.

[Printed across the face in red ink:] Paid Dec. 6, 1893. Capital National bank, Lincoln, Neb.

Ex. 42—E. H.

Babbit's Certificate of Deposit Register.

Date.	Deposited by—	Number.	Amount.	Total.	Date paid.	Payable to—
1891.						
Aug. 6.	Collections.	25047	975	....	8, 8, '91.	

[* Word and figure enclosed in brackets erased in copy.]

(Copy.) *[No. 4.]

Capital National Bank.

Interest at — if left — months. No interest after maturity.

$37,975.00. LINCOLN, NEB., *Aug. 5th*, 1891.

J. E. Hill, treas., has deposited in this bank thirty-seven thousand nine hundred seventy-five dollars payable to the order of self on return of this certificate properly endorsed.

No. 25047. C. W. MOSHER, *P't.*

Not subject to check.

[Printed across the face in red ink:] Paid Dec. 13, 1892. Capital National bank, Lincoln, Neb.

Pay C. W. Mosher, pr't, or order, for collection account of treasurer of State of Nebraska.

J. E. HILL, *Treasurer.*
BARTLETT.

221 Ex. 43—E. H.

Babbit's Certificate of Deposit Register.

Date.	Deposited by—	Number.	Amount.	Total.	Date paid.	Payable to—
1891.						
July 27.	H. R. Krug.	24986	1,000	.....	8, 7, '91	

Copy. *[No. 4.]

Capital National Bank.

Interest at 6% if left 6 months. No interest after maturity.

$7,000.00. LINCOLN, NEB., *July* 27, 1891.

H. R. Krug has deposited in this bank seven thousand dollars, payable to the order of self on return of this certificate properly endorsed.

No. 24986. C. W. MOSHER, *P't.*

Not subject to check.

Int. paid to Nov. 27, '91. Int. paid to July 27, '92.
H. R. KRUG.

[Printed across the face in red ink:] Paid Aug. 13, 1892. Capital National bank, Lincoln, Neb.

[* Word and figure enclosed in brackets erased in copy.]

Ex. 44—E. H.

Babbit's Certificate of Deposit Register.

Date.	Deposited by—	Number.	Amount.	Total.	Date paid.	Payable to—
1891.						
July 27.	A. P. S. Stuart.	24981	20	....	1, 27, '92	

(Copy.) * [No. 4.]

Capital National Bank.

Interest at 6% if left six (6) months. No interest after maturity.

$2,000.00. LINCOLN, NEB., *July* 27, 1891.

A. P. S. Stuart has deposited in this bank two thousand dollars payable to the order of self on return of this certificate properly endorsed.

No. 24991. C. W. MOSHER, *Pt.*

Not subject to check.

A. P. S. Stuart. M. E. Stuart.

[Printed across the face in red ink:] Paid Jan. 27, 1892. Capital National bank, Lincoln, Neb.

222

Ex. 45—E. H.

Babbit's Certificate of Deposit Register.

Date.	Deposited by—	Number.	Amount.	Total.	Date paid.	Payable to—
1891.						
July 20.	Collections.	24941	5,000	...1	8, 6, '91	

(Copy.) * [No. 4.]

Lancaster Co. Coupons.

Capital National Bank.

Interest at — if left — months. No interest after maturity.

$10,000.00. LINCOLN, NEB., *July* 20, 1891.

J. E. Hill, St. treas., has deposited in this bank ten thousand and no $\frac{100}{100}$ dollars payable to the order of self on return of this certificate properly endorsed.

No. 24941. O. F. FUNKE,
For Cash.

Not subject to check.

[Printed across the face in red ink:] Paid Aug. 6, 1891. Capital National bank, Lincoln, Neb.

[* Word and figure enclosed in brackets erased in copy.]

Ex. 46—E. H.

Babbit's Certificate of Deposit Register.

Date.	Deposited by—	Number.	Amount.	Total.	Date paid.	Payable to—
1891.						
Nov. 18.	Colls.....	25636	100			

(Copy.) * [No. 4.]

Capital National Bank.

Interest at — if left — months. No interest after maturity.

$50,000.00 LINCOLN, NEB., *Nov.* 18, 1891.

J. E. Hill, treas., has deposited in this bank fifty thousand dollars payable to the order of self on return of this certificate properly endorsed.

No. 25636. C. W. MOSHER, *P't.*

Not subject to check.
J. E. Hill, treas.

[Printed across the face in red ink:] Paid May 21, 1892. Capital National bank, Lincoln, Neb.

6.

Ex. 47—E. H.

Copy.

1884.

Cr. 12, 29..... $813

Ex. 48—E. H. 55.

Copy.

1888.

Apr. 14. Cr..... .... $2,500

223

Ex. 49—E. H.

58.

Copy.

1888.

Cr. June 9..... 1,500

Ex. 50—E. H.

65.

Copy.

1888.

Nov. 16. Cr. Error..... $2,500

[* Word and figure enclosed in brackets erased in copy.]

Ex. 51—E. H.

78.

Copy.

1889.

June 28. By warrants.... 10,000

Ex. 52—E. H.

83.

Copy.

1889.

Sept. 30. By cost real est..... 7,000

Ex. 53—E. H.

95.

Copy.

1890.

M'ch 19. Cr..... ..... 5,000 00

Ex. 54—E. H.

98.

Copy.

1890.

May 16. Credit N. Y..... ..... 1,500 00

Ex. 55—E. H.

19. Credit Chic 2,000

Ex. 56—E. H.

21. Credit N. Y... 1,500

Ex. 57—E. H.

99.

Copy.

1890.

June 3. Credit real est... 2,500

224

Ex. 58—E. H.

108.

Copy.

1890.

Sept. 24. Cr. by real est. ac..... 5,000

Ex. 59—E. H.

115.

Copy.

Dec. 27. Cr. S. & B. ac..... 10,000

Ex. 60—E. H.

125.

Copy.

1891.

Ap'l 9. Cr. pris. cont..... 800

Ex. 61—E. H.

127.

Copy.

1891.

May 2. Credit..... 7,200

Ex. 62—E. H.

131.

Copy.

1891.

June 20. Cr. by... .... 10,000 00

Ex. 63—E. H.

140.

Copy.

1891.

Sept. 25. Cr..... 14,000

Ex. 64—E. H.

151.

Copy.

1892.

Feb. 2.	To bal.....	2,103 44

Ex. 65—E. H.

158.

Copy.

1892.

May 4.	Credit by York.....	5,000

225 Ex. 66—E. H.

Credits to Interest-paid Account.

Dec.	29, 1884.....	$813	
April	14, 1888.....	2,500	
June	9, 1888.....	1,500	
Nov.	16, 1888.....	2,500	
June	28, 1889.....	10,000	
Sept.	30, 1889.....	7,000	
March	19, 1890.....	5,000	
May	16, 1890.....	1,500	
June	3, 1890.....	2,500	
May	19, 1890.....	2,000	
May	21, 1890.....	1,500	
Sept.	24, 1890.....	5,000	
Dec.	27, 1890.....	10,000	
April	9, 1891.....	800	
May	2, 1891.....	7,200	
June	20, 1891.....	10,000	
Sept.	25, 1891.....	14,000	
Feb'y	2, 1892.....	2,103	44
May	4, 1892.....	5,000	
		$90,916	44

Copy.	Tuesday, Dec. 24, 1889.			Thursday, Dec. 26, 1889.			
Name.	Checks in detail.	Total Dr.	Credits.	Balance.	Checks in detail.	Total Dr.	Credits.
State treasurer		50,000	23,328 75 100,000	73,328 75			

Ex. 68.—E. H.

$30,000 *Surplus Charged Off Feb'y* 2, 1892.

Surplus	$30,000		
Carleton coll.	1,425	85	
Nebraska Mfg. Co	121	86	
			$31,547 71
Chase	900		
Hale	111	25	
Stout	1,050		
Stout	3,150		
Stout	2,100		
Nebr. Mfg. Co	4,000		
Striplin	300		
Barstow	420	23	
Simmons	40	90	
Wilcox	50	00	
McDonald	165		
Roggen	355	32	
McFall	412		
Glumply	36	61	
Pierce	50	00	
Pierce	65	00	
Sewell	40	00	
Adams	325	00	
Jenkins	606	96	
Smithson	25	00	
Ewing	325		
Garlock	78	75	
Cooper	400	00	
Hawkins	100		
McMahon	250		
Adams	100		
Ferris	125		
McMahon	500		
American Exchange Europe	725	40	
Fairmount	521	91	
Carleton	4,073	13	
			$21,402 46
Premium	621	57	
Stocks & bonds	4,650		
Expense	646	08	
Taxes	1,012	50	
Wages	1,111	66	
Interest paid	2,103	44	
			10,145 25
			$31,547 71

228 EX. 69.—E. H.

DR. *Western Manufacturing Co. Notes in Account with Capital National Bank, Lincoln, Neb.*

No.	Issued.	Amount.	Paid.
41672	July 25, 1888	5,000	Jan. 19, '89
42462	" 25, "	5,000	Oct. 27, '88
44752	Jan. 19, 1889	5,000	May 25, '89
60069	May 25, "	5,000	Sept. 30, '89
74006	Sept. 30, "	5,000	Apr. 7, '90
80065	Apr. 7, 1890	5,000	May 9, '91
92000	Aug. 7, "	5,000	Feb. 14, '91
1	" 7, "	5,000	Oct. 30, '90
2	" 7, "	5,000	Feb. 10, '91
3	" 7, "	5,000	" 10, '91
4	" 7, "	5,000	Sept. 12, '90
93000	" 28, "	5,000	" 26, '90
1	" 28, "	5,000	M'ch 11, '91
2	" 29, "	5,000	May 9, '91
93030	Oct. 2, "	5,000	Oct. 30, '90
98011	Feb. 10, 1891	5,000	Apr. 30, '91
2	" 10, "	5,000	Feb. 16, '91
3	" 14, "	5,000	May 1, '91
95139	" 16, "	5,000	June 2, '91
96093	M'ch 11, "	5,000	" 5, '91
4	" 11, "	5,000	" 3, '91
98030	Apr. 13, "	5,000	Aug. 18, '91
100117	May 9, "	5,000	June 8, '91
101012	" 9, "	5,000	May 14, '91
98161	June 2, "	5,000	Aug. 8, '91
99022	" 3, "	5,000	Sept. 17, '91
99068	" 5, "	5,000	" 2, '91
101104	Aug. 8, "	5,000	Dec. 1, '91
102053	" 18, "	5,000	" 11, '91
112005	" 27, "	5,000	Nov. 4, '91
101194	" 28, "	5,000	" 19, '91
113000	" 28, "	5,000	" 5, '91
102063	" 2, "	5,000	Dec. 11, '91
102093	Sept. 17, "	5,000	Jan. 18, '92
112013	Oct. 7, "	5,000	Feb. 5, '92
112016	" 26, "	5,000	M'ch 4, '92
111187	" 29, "	5,000	Feb. 5, '92
113007	Nov. 4, "	5,000	M'ch 4, '92
101292	" 5, "	5,000	Jan. 12, '92
102173	" 7, "	2,500	" 18, '92
111208	" 7, "	2,500	" 18, '92
112054	" 12, "	5,000	Nov. 18, '91
112072	" 19, "	5,000	Feb. 16, '92
112112	" 28, "	5,000	M'ch 4, '92

No.	Issued.		Amount.	Paid.
113019	Dec. 1, 1891	.....	5,000	Apr. 18, '92
113037	" 11, "	.....	5,000	M'ch 31, '92
229				
114010	" 11, "	.....	5,000	Apr. 26, '92
111328	Jan. 18, 1892	.....	5,000	Feb. 3, '92
113098	" 18, "	.....	5,000	Apr. 18, '92
114068	" 18, "	.....	5,000	June 13, '92
117003	" 18, "	.....	5,000	July 25, '92
114107	Feb. 3, "	.....	5,000	June 13, '92
115033	" 5, "	.....	5,000	" 18, '92
116008	" 5, "	.....	5,000	June 13, '92
117005	" 11, "	.....	5,000	Apr. 5, '92
118000	" 11, "	.....	5,000	Aug. 6, '92
118001	" 11, "	.....	5,000	" 6, '92
118004	" 15, "	.....	5,000	Dec. 10, '92
118005	" 15, "	.....	5,000	Aug. 8, '92
115069	" 16, "	.....	5,000	June 13, '92
115092	" 19, "	.....	5,000	" 13, '92
116012	" 19, "	.....	5,000	" 16, '92
119000	M'ch 3, "	.....	5,000	July 30, '92
119001	" 3, "	.....	5,000	M'ch 4, '92
119002	" 3, "	.....	5,000	" 7, '92
119003	" 3, "	.....	5,000	Aug. 12, '92
119004	" 3, "	.....	5,000	May 23, '92
115124	" 4, "	.....	5,000	June 13, '92
115125	" 4, "	.....	5,000	" 13, '92
116025	" 4, "	.....	5,000	" 18, '92
116026	" 4, "	.....	5,000	" 18, '92
119007	" 7, "	.....	5,000	Sept. 9, '92
119010	" 12, "	.....	5,000	Aug. 11, '92
119016	" 16, "	.....	5,000	" 11, '92
119018	" 26, "	.....	5,000	May 16, '92
116100	" 31, "	.....	5,000	June 18, '92
116111	Apr. 9, "	.....	5,000	June 18, '92
116116	" 18, "	.....	5,000	" 16, '92
116117	" 18, "	.....	5,000	" 18, '92
120008	" 28, "	.....	5,000	May 6, '92
118128	June 13, "	.....	5,000	Aug. 8, '92
118129	" 13, "	.....	5,000	July 25, '92
118130	" 13, "	.....	5,000	Aug. 8, '92
118131	" 13, "	.....	5,000	" 8, '92
119048	" 13, "	.....	5,000	" 12, '92
119049	" 13, "	.....	5,000	" 10, '92
119050	" 13, "	.....	5,000	Sept. 30, '92
122002	" 16, "	.....	5,000	Jan. 5, '93
120017	" 18, "	.....	5,000	Oct. 19, '92
120018	" 18, "	.....	5,000	Aug. 10, '92
120019	" 18, "	.....	5,000	" 13, '92
122003	" 18, "	.....	5,000	" 13, '92

No.	Issued.	Amount.	Paid.
122004	June 18, 1892	5,000	July 26, '92
122005	" 18, "	5,000	" 26, '92
131010	July 26, "	5,000	
131011	" 26, "	5,000	
230			
122016	" 30, "	5,000	
120165	Aug. 24, "	5,000	Dec. 10, '92
122018	" 24, "	5,000	
117189	" 30, "	5,000	Sept. 20, '92
118193	" 30, "	5,000	Oct. 17, '92
118194	" 30, "	5,000	" 17, '92
118195	" 30, "	5,000	" 17, '92
118196	" 30, "	5,000	" 17, '92
118197	" 30, "	5,000	" 17, '92
118198	" 30, "	5,000	" 17, '92
118199	" 30, "	5,000	" 17, '92
119169	" 30, "	5,000	" 19, '92
119170	" 30, "	5,000	" 19, '92
119171	" 30, "	5,000	" 19, '92
120172	" 30, "	5,000	Dec. 10, '92
133000	Sept. 9, "	5,000	
119174	" 15, "	5,000	Sept. 20, '92
119175	" 15, "	5,000	" 20, '92
133001	" 15, "	5,000	Oct. 3, '92
133002	" 15, "	5,000	" 3, '92
131017	" 20, "	5,000	
133003	" 20, "	5,000	
133004	" 20, "	5,000	
122097	" 30, "	5,000	Jan. 5, '93
119177	Oct. 3, "	5,000	Oct. 19, '92
119178	" 3, "	5,000	" 19, '92
133009	" 10, "	5,000	
132008	" 17, "	5,000	
132009	" 17, "	5,000	
132010	" 17, "	5,000	
134002	" 17, "	5,000	
134003	" 17, "	5,000	
134004	" 17, "	5,000	
134005	" 17, "	5,000	Oct. 26, '92
132012	" 19, "	5,000	
133011	" 19, "	5,000	
133012	" 19, "	5,000	
133013	" 19, "	5,000	
133014	" 19, "	5,000	
133015	" 19, "	5,000	
120206	" 26, "	5,000	Oct. 27, '92
134013	" 27, "	5,000	
135005	Nov. 30, "	5,000	

No.	Issued.	Amount.	Paid.
136000	Dec. 9, 1892	5,000	
136001	" 10, "	5,000	
136002	" 10, "	5,000	
136003	" 10, "	5,000	
136006	" 30, "	5,000	Jan. 6, '93
134038	Jan. 5, 1893	5,000	
134039	" 5, "	5,000	
134040	" 5, "	5,000	
231 & 232			
136008	" 5, "	5,000	
137001	" 5, "	5,000	
137002	" 5, "	5,000	
136010	" 6, "	5,000	
137203	" 21, "	5,000	
	Total	755,000	

(Here follow exhibits marked pp. 233 to 238, inclusive.)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

239 Ex. 75—E. H.

(Copy.)

Registry return receipt sent June 14, 1893.
Reg. No. 1613 from post-office at Lincoln, Nebr.
* Reg. letter / Reg. †[parcel] } addressed to Gruetter & Joers, Lincoln, Nebr.
After obtaining receipt below the postmaster will mail this card, without cover and without postage, to address on the other side.

Received the above-described registered { * letter. / †[parcel].

(Sender's name on the other side.)

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

Gruetter & Joers.

....

When the registered letter or parcel accompanying this card is delivered, the postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $300 is fixed by law for using this card for other than official business.

Post-office Department.

Official business.

Post-office at { Stamp here name of post-office / and date of delivery.

Return to:

Name of sender: K. K. Hayden.

Street and number, or post-office box. .....

Post-office at Lincoln,

County of Lancaster, State of Neb.

---

* Erase letter or parcel, according to which is sent.
[† Word enclosed in brackets erased in copy.]

240

Ex. 76—E. H.

(Copy.) * [No. 4.]

Certificate No. 3.

Capital National Bank.

Interest at 6% if left 6 months. No interest after maturity.

$5,000. LINCOLN, NEB., *Nov.* 2, 1892.

A. P. S. Stuart has deposited in this bank five thousand dollars payable to the order of self on return of this certificate properly endorsed.

No. 27967. C. W. MOSHER, *Pt.*

Not subject to check.

A. P. S. Stuart.

Aug. Theod. Gruetter & Co.

Paid through Lincoln clearing-house Dec. 28, 1892, to First National bank.

[Printed across the face in red ink:] Paid Dec. 28, 1892. Capital National bank, Lincoln, Neb.

Ex. 77—E. H.

(Copy.) * [No. 4.]

Certificate No. 3.

Capital National Bank.

Interest at 6% if left 12 months. No interest after maturity.

$2,000. LINCOLN, NEB., *Apr.* 6, 1892.

A. P. S. Stuart has deposited in this bank twenty hundred dollars payable to the order of self on return of this certificate properly endorsed.

No. 26572. C. W. MOSHER.

Not subject to check.

A. P. S. Stuart.

[Printed across the face in red ink:] Paid Dec. 27, 1892. Capital National bank, Lincoln, Neb.

[* Word and figure enclosed in brackets erased in copy.]

241 Ex. 78—E. H.

(Copy.) * [No. 4.]

Certificate No. 3.

Capital National Bank.

Interest at 5 or 6% if left 6 or 12 months. No interest after maturity.

$2,000.00. LINCOLN, NEB., *July* 9, 1892.

A. P. S. Stuart has deposited in this bank two thousand $\frac{00}{100}$ dollars payable to the order of self on return of this certificate properly endorsed.

No. 27161. O. F. FUNKE,
For Cash.

Not subject to check.

No. 32492. National Bank of Commerce, Omaha, Neb.

[Printed across the face in red ink:] Paid Jan. 9, 1893. Capital National bank, Lincoln, Neb.

A. P. S. Stuart. Pay to S. Karpen & Bros. order Aug. Th. Gruetter & Co.

S. KARPEN & BROS.

Paid through Lincoln clearing-house Jan. 9, 1893. American Exch. Nat'l Bank of Lincoln, Neb.

National Bank of Commerce:

Pay —— ——, Omaha, Neb., or order for collection and returns. Bank of Commerce, Chicago, Ill.

FRED MILLER, *Cashier.*

For collection account of National Bank of Commerce, Omaha, Neb.

E. L. BIERBOWER, *Cashier.*

Deed Record 75, page 536.

Warranty Deed.

Ambrose P. S. Stuart and wife
to
Charles Holland.

Filed for record Dec. 5, 1893, at 2 p. m. Jno. D. Knight, register of deeds; J. H. Fawell, dep. Fee, $1.00.

Know all men by these presents, that Ambrose P. S. Stuart and Martha E. Stuart husband and wife of the county of Lancaster and State of Nebraska, for and in consideration of the sum of one hundred thousand dollars in hand paid, do hereby grant, bargain,

[* Word and figure enclosed in brackets erased in copy.]

242 sell, convey, and confirm unto Charles Holland of the county of York, and State of Maine, the following-described real estate situated in Lincoln, in Lancaster county and State of Nebraska, to wit:

The south half of lots four, five, and six (4, 5 & 6) in block 27; lot "C" in block 54; subd. of lots 1, 2, 3, 4, 5, & 6 lots nine and ten (9 & 10) in block 59; lot four (4) in block forty-one, (41), lot "A" subdivision of lots 4, 5, & 6, in block 10 in Kinney's O St. addition; lots 7 & 8 in block 28, in Kinney's O St. addition; lots 3, 4, 5, & 6, in block 2 in Spencer's addition; lot "C" in Hoagland's subdivision and lots D, E, & F, in Baldwin's subdivision of lots 5 & 6 in block 39. And we do hereby covenant with the said Charles Holland and his heirs and assigns that we are lawfully seized of said premises; that they are free from incumbrance excepting of certain mortgage of $30,000; that we have good right and lawful authority to sell the same; and we do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever. And the said Martha E. Stuart hereby relinquishes all her right of dower in and to the above-described premises.

Signed this 5th day of December, A. D. 1893.

AMBROSE P. S. STUART.
MARTHA E. STUART.

In presence of—
WILLIAM STULL.

STATE OF NEBRASKA, } ss:
Lancaster County, }

On this 5th day of December, A. D. 1893, before me, H. T. Folsom, a notary public, duly commissioned and qualified for and residing in said county, personally came Ambrose P. S. Stuart and Martha E. Stuart, his wife, to me known to be the identical persons described — and who executed the foregoing conveyances as grantor-, and acknowledged the said instrument to be their voluntary act and deed.

Witness my hand and notarial seal the day and year last above written.

[SEAL.] H. T. FOLSOM.

Commission expires Feb. 28, 1899.

STATE OF NEBRASKA, } ss:
Lancaster County, }

I, John Harrop, register of deeds of said county, hereby certify that the above and foregoing is a true and correct copy of a deed as appears of record in this office in Deed Record 75 at page 536.

243 In testimony whereof I have hereunto set my hand and affixed the seal of said county, at the city of Lincoln, this 20th day of February, A. D. 1895.

JOHN HARROP,
Register of Deeds,
By J. A. KNIGHT, *Deputy.*

Ex. 79—E. H.

Miscellaneous Record D, page 364.

General Power of Attorney from Charles Holland to Ambrose P. S. Stuart.

Filed for record Dec. 27th, 1882, at 10.15 a. m. J. H. McClay, county clerk.

Know all men by these presents that I, Charles Holland of Kennebunk, in the county of York, State of Maine, have made, constituted and appointed and by these presents do make, constitute and appoint Ambrose P. S. Stuart of Lincoln, in the county of Lancaster and State of Nebraska, to be my true, sufficient and lawful attorney for me and in my name and stead, and to use, to ask, demand, levy, require, recover, and receive of and from all and every person or persons whomsoever, the same shall or may concern all and singular sum and sums of money, debts, goods, wares, merchandise, effects, and things whatsoever and wheresoever they shall and may be found due, owing, payable, belonging and coming unto me the constituent by any ways and means whatsoever, and to collect all notes and debts, give discharges of the same and to discharge all mortgages or other instruments held as security for any debt due me in Nebraska, to execute assignments and deeds in my name in said Nebraska, by signing, sealing and delivering the same. Giving and hereby granting unto my said attorney full and whole strength, power and authority in and about the premises, and to take and use all due means, course and process in the law, for the obtaining and recovering the same, and of recoveries and receipts thereof, and in my name to make, seal and execute due acquittance and discharge; and for the premises to appear, and the person of me the constituent to represent before any governors, judges, justices,
244 officers, and ministers of the law whatsoever, in any court or courts of judicature, and there on my behalf to answer, defend and reply unto all actions, causes, matters and things whatsoever relating to the premises. Also to submit any matter in dispute to arbitration or otherwise; with full power to make and substitute one or more attorneys under him *in* my said attorney and the same again at pleasure to revoke. And generally to say, do, act, transact, determine, accomplish and finish all matters and things whatsoever relating to the premises as fully, amply and effectually to all intents and purposes, as I the said constituent, if present, ought or might personally, although the matter should require more special authority than is herein comprised, I the said constituent ratifying, allowing and holding firm and valid all and whatsoever my said attorney or his substitutes shall lawfully do or cause to be done in and about the premises, by virtue of these presents.

In witness whereof I have hereunto set my hand and seal this

twenty-first day of December, in the year of our Lord one thousand eight hundred and eighty-two.

CHARLES HOLLAND. [SEAL.]

Signed, sealed & delivered in presence of—
CHRISTOPHER LITTLEFIELD.

STATE OF MAINE, } ss:
County of York, }

On this 21 day of December, A. D. 1882, before me, C. Littlefield, a notary public, duly appointed, commissioned and qualified for and residing in the said county, personally appeared the above-named Charles Holland, to me personally known to be the identical person described in and whose name is affixed to the foregoing instrument and he acknowledged the same to be his voluntary act and deed.

In testimony whereof I have hereunto set my hand, at said Kennebunk, in said county of York, the day and year last above written.

[SEAL.] C. LITTLEFIELD,
Notary Public.

STATE OF NEBRASKA, } ss:
Lancaster County, }

I, John Harrop, register of deeds of said county, hereby certify that the above and foregoing is a true and correct copy of
245 a P. of attorney as appears of record in this office, in Miscl. Record D, at page 364.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at the city of Lincoln, this 20th day of February, A. D. 1895.

[SEAL.] JOHN HARROP,
Register of Deeds,
By J. A. KNIGHT, *Dep.*

Ex. 80—E. H.

Published Dec. 17, '92.

Report of the Condition of the Capital Nat'l Bank, at Lincoln, in the State of Nebraska, at the Close of Business Dec. 9, '92.

RESOURCES.

Loan- & discounts	$768,601 44
Overdrafts, secured & unsecured	6,217 74
United States bond, to secure circulation	50,000
Stocks, securities, etc	325 00
Due from approved reserve agents	107,090 01
" " other nat'l banks	17,800 33
" " State banks and bankers	5,394 72
Banking-house furniture & fixtures	5,770 00
Other real estate & mortgages owned	38,617 92

Current exp. & taxes paid		$14,286 28
Checks & other cash items		3,698 56
Exchange for clearing-house		8,841 16
Bills of other banks		2,355 00
Fractional paper currency, nickels & cent		298 71
Specie		26,789 50
Legal-tender notes		17,431 00
Redemption funds with U. S. 5 per cent. of circulation		1,350 00
Total		$1,074,867 37

246 LIABILITIES.

Capital stock paid in		$300,000 00
Surplus fund		6,000 00
Undivided profits		21,180 75
National bank notes outstanding		45,000 00
Individual dep. subj. to check	356,139 33	
Demand cert. of deposit	158,545 88	
Due to other national banks	81,574 14	
Due to State banks & bankers	47,372 89	
		643,632 24
Notes & bills rediscounted		59,054 38
Total		$1,074,867 37

STATE OF NEBRASKA, }
County of Lancaster, } ss:

I, R. D. Outcalt, cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 15th day of December, 1892.

HAL. C. YOUNG,
Notary Public.

Ex. 81—E. H.

C. W. MOSHER,
C. E. YATES,
R. C. PHILLIPS,
Directors.

Correct.
Attest.

I, E. J. Hedges, do hereby certify that all of the exhibits attached to this testimony and being copies of records and books of the Capital National Bank of Lincoln, Nebraska, are true and correct copies of the books, records and entries which were offered in evidence herein by counsel for complainant or respondent, and that by agree-

ment between counsel for complainant and respondent, said copies are inserted in this evidence and attached thereto, in place of the originals thereof.

In witness whereof I have hereunto set my hand and official seal at Lincoln, Nebraska, this 30th day of March, A. D. 1895.

[SEAL.] ——— ———,
Notary Public.

My commission expires March 28, 1899.

247 Upon the back of said testimony appear indorsements in the words and figures following, to wit:

No. 69, "Q." Kent K. Hayden, receiver, *vs.* Ambrose P. S. Stuart *et al.* Testimony on behalf of the complainant. Rec'd and filed April 8, 1895, and opened by order of court April 16, 1895. E. D. Frank, clerk.

Thereupon afterwards, at the January term of said court, on the 19th day of April, 1895, the following proceedings were had and done in said case, as appears of record on folio —, Journal "T" of said court, to wit:

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln,
vs.
AMBROSE P. S. STUART *et al.* } 69, "Q."

On motion of C. C. Flansburg, solicitor for said defendant Ambrose P. S. Stuart, leave is hereby granted by the court to file answer to the cross-bill of complaint herein instanter, and cross-complainant is rule- to file replication thereto instanter, which is done.

(S'g'd) JOHN A. RINER, *Judge.*

Thereupon afterwards, to wit, on the said 19th day of April, 1895, answer of respondent, Ambrose P. S. Stuart, to cross-bill was filed in said case, which said answer is in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska, Complainants,
vs.
AMBROSE P. S. STUART, AUGUSTUS T. GRUETTER, and CHARLES F. JOERS (Copartners as Gruetter & Joers), Respondents.

Answer of Respondent Ambrose P. S. Stuart to the Cross-bill of Complaint of Cross-complainant.

This respondent now and at all times hereafter, saving to himself all and all manner of benefit or advantage of exception, or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or

so much thereof as this respondent is advised that it is material or necessary for him to make answer thereto, answering sayeth:

248 That on the 16th day of December, 1892, this respondent was the owner and holder of, and had standing in his name one hundred fifty shares of capital stock of the said Capital National bank, upon the books of the said association, and that on said day he entered into a contract with his said codefendants Augustus T. Gruetter and Charles F. Joers firm name of Gruetter & Joers by the terms of which he agreed to purchase, and did purchase of the said Gruetter & Joers their certain brick business block, situated on lots D, E, & F, subdivision of lots five (5) and six (6), of block thirty-nine (39), of the original plat of Lincoln, Nebraska, at an alleged and agreed consideration of $67,500.00.

That there was upon said building at said time a valid existing mortgage indebtedness of $30,000, drawing 6 per cent. interest, upon which there was accumulated interest at that time, which mortgage and interest it was agreed respondent should assume and pay off and discharge, as a part of said agreed consideration for said transfer.

It was further then and there agreed that the said one hundred fifty shares of capital stock of the said Capital National bank, then held and owned by this respondent Ambrose P. S. Stuart should be received by Augustus T. Gruetter and Charles F. Joers (copartners as Gruetter & Joers) at and as of the value of $18,000, and it was further agreed that the taxes thereon, amounting to $250, *was* to be paid by the respondent, and the balance of said consideration amounting to $18,124.34, agreed upon in the sale of said property, was to be paid in cash by this respondent; and on said day, and to bind the said bargain between the said parties, this respondent drew his check upon the said Capital National bank in favor of the said Gruetter & Joers, for the sum of one thousand dollars ($1,000) which check was presented by the said Gruetter & Joers to the said Capital National bank, and the money received thereon.

That afterwards and on the 22nd day of December, 1892, the said Augustus T. Gruetter and Charles F. Joers made, executed, and delivered to this respondent a good and sufficient deed to the said premises, pursuant to the said agreement theretofore entered into, and upon said date, and at the time of the delivery of said deed, this respondent wrote his name in blank upon the back of the 150 shares of stock of the said Capital National bank under the power of attorney thereon and delivered the same to the said Augustus T. Gruetter and Charles F. Joers, and the balance of said consideration due and owing to the said Augustus T. Gruetter and Charles *T.* Joers was paid in the manner following—that is to say, this respond-

249 ent had a certificate of deposit on the said Capital National bank, in amount $5,000, and another certain certificate of deposit, on the said Capital National bank of $2,050.00 and another certificate of deposit on the said Capital National bank of $2,050.00 and a certain bank book on the Industrial savings bank, of Lincoln, Nebraska, upon which there was then due $2,000, a certain savings-bank book on the Lincoln savings bank, on which there was due $1,426.84; a certain other certificate of deposit of

$3,000.00 on the Industrial savings bank, Lincoln, Nebraska; a certain other certificate of deposit of $1,250.00 on the Industrial savings bank, of Lincoln, Nebraska, and a one certain check of $312.50, drawn on the said Capital National bank, of Lincoln, Nebraska, and all of said certificates of deposit, bank books and checks were by this respondent made payable to the order of the said Augustus T. Gruetter and Charles F. Joers (partners as Gruetter & Joers) and were duly indorsed to them, and the said Augustus T. Gruetter and Charles F. Joers did present the same and did receive thereon the sum of $17,124.34, in cash, which, together with the $1,000 paid on the 16th day of December, 1892, at the time the bargain was made, made a total of $18,124.34, which this respondent paid to the said Augustus T. Gruetter and Charles F. Joers, at the time of the transfer of the said one hundred fifty shares of capital stock of the said Capital National bank. And said Gruetter and Joers still retain said sums of money and have never offered to return the same and have never tendered it back to this respondent. That the interest upon said mortgage, amounting to $900.00, and the taxes upon said premises, amounting to $250.00, was paid by this respondent upon the completion of the said trade and the delivery of the said deed to this respondent.

That the said Augustus T. Gruetter and Charles F. Joers (copartners as Gruetter & Joers) at the time of the said transfer were engaged in the business of retail furniture sellers, in the city of Lincoln, Nebraska, and were not at this time, as this respondent has been informed and believes, and so answers upon information and belief, insolvent and pecuniarily irresponsible, as charged in complainant's bill, but respondent charges the fact to be that at the time of said transfer of the said Capital Notional bank stock, said respondent had no knowledge whatever of the financial condition of the said Augustus T. Gruetter and Charles T. Joers (partners as Gruetter & Joers), but the said Gruetter & Joers had at that time a stock of furniture and carpets of about the value of $20,000.00, and this respondent paid to them, together with the said bank stock, the sum of $18,124.34 in cash, and believed them to be solvent.

250 And said respondent further says that he had no knowledge whatever of the condition of the said bank, nor did he know that the said bank was insolvent, but at the time of the transfer of said shares of stock this respondent believed the bank to be in a good condition and perfectly solvent, and at the time of said transfer, this answering defendant had no expectation or anticipation of any failure of the said bank, or change in its condition; nor did he have any expectation of the enforcement of his liability as a shareholder of the said bank, but made the said transfer to the said Augustus T. Gruetter and Charles F. Joers (partners as Gruetter & Joers) in good faith and for a valuable consideration, and that at the time of the said transfer the said Gruetter & Joers were in possession of the said business property of the value of $67,500, and that the stock of furniture and carpets at that time in their possession was of the value of $30,000.00, and respondent paid to them, when he delivered said bank stock, the sum in cash of

$18,124.34, and respondent had no reason to believe nor did he believe that the said defendants Augustus T. Gruetter and Charles F. Joers (of the said firm of Gruetter & Joers) were insolvent or in contecplation of insolvency, but believed, and still believes, that they were at that time perfectly solvent and able to respond to any call for an assessment upon the stock had it then been made.

That the said transfer of the said bank stock upon the books of the said Capital National bank was made by some other person than this respondent; that upon the sale and transfer being made as aforesaid respondent delivered the said certificate of stock, duly indorsed in blank to the said Augustus T. Gruetter & Charles F. Joers (copartners as Gruetter & Joers), since which time it has been out of his possession and in the possession of the said Gruetter & Joers.

That the complainant herein has made no attempt or effort to collect the said assessment from the said Augustus T. Gruetter and Charles F. Joers (partners as Gruetter & Joers), although the legal title to the said shares of stock is in the said Gruetter & Joers, and not in this respondent.

That on or about the 23rd day of January, 1893, the said defendants Gruetter & Joers commenced an action in the district court of Lancaster county, Nebraska, against this respondent, which is still pending and undetermined, affirming and alleging the validity of the said contract of the said one hundred fifty shares of stock to them, and seeking damages against this respondent, by reason of the said one hundred fifty shares of bank stock having been rendered worthless, because of the insolvency of the said
251 Capital National bank, and this respondent denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged; without this, that there is any other *answer*, cause or thing in the said complainant's bill of complaint contained material or necessary for this respondent to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied is true to the knowledge or belief of this respondent; all of which matters and things this respondent is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be dismissed of his costs and charges in this behalf most (*most*) wrongfully sustained.

AMBROSE P. S. STUART,
By C. C. FLANSBURG,
His Solicitor.

STATE OF NEBRASKA, } ss:
Lancaster County, }

On this 14th day of March, 1894, before me, the undersigned, a notary public, duly commissioned and qualified in and for said county, appeared Ambrose P. S. Stuart, who, being duly sworn according to law, on his oath says that the allegations in the foregoing answer are true.

Subscribed in my presence and sworn to before me this 14th day of March, 1894.

——— ———.

Upon the back of said answer appear indorsements in the words and figures following, to wit: No. 69 "Q." Circuit court of the United States for the district of Nebraska. Kent K. Hayden (receiver), plaintiff, *vs.* Ambrose P. S. Stuart *et al.*, defendants. Answer of respondent Ambrose P. S. Stuart to cross-bill. Filed Apr. 19, 1895. Elmer D. Frank, clerk. C. C. Flansburg, solicitor for respondent.

Thereupon afterwards, to wit, on the said 19th day of April, 1895, a replication was filed in said case; which said replication is in the words and figures following, to wit:

In the Circuit Court of the United States in and for the District of Nebraska.

KENT K. HAYDEN, Receiver, etc., Compl't,
vs.
AMBROSE P. S. STUART *et al.*
} In Equity. No. 69, "Q."

The Replication of Augustus T. Gruetter and Charles F. Joers, Cross-complainants, to the Answer of Ambrose P. S. Stuart, Defendant.

These repliants, saving and reserving unto themselves now and at all times hereafter all and all manner of benefit and ad-
252 vantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, say that they will aver, maintain and prove their said cross-bill of complaint to be true, certain and sufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied is true; all of which matters and things these repliants — and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by *his* said cross-bill of complaint they have already prayed.

HARWWOD, AMES & PETTIS,
F. *Solicitors for Plaintiff.*

Upon the back of said replication appear indorsements in the words and figures following. to wit: No. 69 "Q." U. S. circuit court, district of Nebraska. In equity. Kent K. Hayden, receiver of the Capital National Bank of Lincoln, *vs.* Ambrose P. S. Stuart *et al.* Replication. Filed Apr. 19, 1895. Elmer D. Frank, clerk. Harwood, Ames & Pettis, solicitor- for plaintiff.

Thereupon afterwards, at the January, 1895, term of said court, on the 23rd day of April, 1895, the following proceedings were had

and done in said case, as appears of record on folio 715, Journal "T" of said court, to wit:

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska, Plaintiff, *vs.* AMBROSE P. S. STUART, AUGUST T. GRUETTER, and Charles F. Joers, Copartners as Gruetter & Joers, Defendants.	69, "Q." Original Bill.
AUGUST T. GRUETTER & CHARLES F. JOERS, Co-partners as Gruetter & Joers, Cross-complainants, *vs.* AMBROSE P. S. STUART, KENT K. HAYDEN, Receiver, Defendants.	Cross-bill.

This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows, to wit: That on and prior to the third day of January, 1893, the defendant Ambrose P. S. Stuart was the owner of and had standing upon the books of the Capital National Bank of Lincoln, Nebraska, in his
253 name one hundred fifty (150) shares of the capital stock of said bank, described in the original bill of complaint and in the cross-bill in this cause, and on or about the sixteenth day of December, 1892, and for more than eight years prior to that date the said defendant Ambrose P. S. Stuart, had been, and was the owner of said one hundred and fifty (150) shares of the capital stock of said bank, as appeared by the books of said bank, and during all of said period he was a member of the board of directors and of the finance committee of said bank. That on the said sixteenth day of December, 1892, and the third day of January, 1893, the said defendant Stuart had knowledge of the then existing insolvency of said Capital National bank. That at the time of the transfer of the said one hundred fifty (150) shares of stock to the cross-complainants August T. Gruetter and Charles F. Joers, mentioned in the bill and in the cross-bill, said defendant Stuart represented to said cross-complainants Gruetter and Joers that said bank was in a solvent and prosperous condition. That said representation of said defendant Stuart to said cross-complainants Gruetter and Joers, was made for the purpose of inducing said cross-complainants Gruetter and Joers to purchase the said one hundred fifty (150) shares of stock, and for the purpose of evading and escaping his liability as a stockholder for an assessment on the said one hundred fifty (150) shares of stock of said bank.

It is further ordered, adjudged and decreed, that the said sale, assignment and transfer of said one hundred fifty (150) shares of stock of the said Capital National bank and all and every of them, from said defendant Ambrose P. S. Stuart to the cross-complainants August T. Gruetter and Charles F. Joers was wholly void as against the said complainants Kent K. Hayden, receiver, and the said cross-

complainants Gruetter & Joers; and that said sale, assignment and transfer of said shares of stock, and all and every of them be, and the same is hereby, set aside, cancelled and held for naught, and that said transfers of stock be reinstated upon the books of the said Capital National bank in the name of the said defendant Ambrose P. S. Stuart, who is declared to be the holder and owner thereof.

It is further ordered, adjudged and decreed, that the said defendant Ambrose P. S. Stuart, within twenty days from date of this decree, shall pay to the complainant Kent K. Hayden, receiver, the full amount of the assessment, to wit: $100.00 per share, made against the said one hundred fifty (150) shares of stock by the Comptroller of the Currency, and that said Kent K. Hayden, receiver, recover from the said Ambrose P. S. Stuart said sum of fif-
254 teen thousand (15,000) dollars, together with interest at the rate of seven per cent. per annum, from the tenth day of July, 1893, being in the aggregate the sum of sixteen thousand eight hundred seventy-five & $\frac{42}{100}$ ($16,875.42) dollars.

It is further ordered, adjudged and decreed, that the said defendant Ambrose P. S. Stuart shall, within twenty days from the date of this decree, make full restitution and payment to the said cross-complainants Gruetter & Joers — the amount of the purchase price of said stock, mentioned in the cross-bill, to wit: the sum of eighteen thousand ($18,000) dollars, together with interest thereon at the rate of seven per cent. per annum, from the third day of January, 1893, being in the aggregate the sum of twenty thousand nine hundred five ($20,905.00) dollars.

It is further ordered, adjudged and decreed, that the said cross-complainants Gruetter & Joers be relieved from all liability to the said complainant Kent K. Hayden, receiver, for and on account of any assessment authorized to be made on said one hundred fifty (150) shares of stock by the Comptroller of the Currency, and in case the said defendant Stuart shall neglect within the time aforesaid to pay each of the aforesaid sums of money, together with the costs of this suit, to be taxed by the clerk, that execution shall issue therefor.

(Signed) JOHN A. RINER, *Judge.*

Thereupon afterwards, to wit: on the 30th day of April, 1895, petition in appeal & assignment of errors were filed in said case; which said petition in appeal and assignment of errors are in the words and figures following, to wit:

Petition in Appeal.

In the Circuit Court of the United States within and for the District of Nebraska.

KENT K. HAYDEN (Receiver), Complainant,
vs.
AMBROSE P. S. STUART *et al.*, Respondents.

The respondent Ambrose P. S. Stuart, by his solicitor, C. C. Flansburg, feeling himself aggrieved by the order and judgment entered

on the — day of April, 1895, in the above-entitled proceeding, does hereby appeal from the said order to the circuit court of appeals for the eighth circuit, and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said judgment is made, duly authenticated, may be sent to
255 the circuit court of appeals for the eighth judicial circuit of the United States.

C. C. FLANSBURG,
Solicitor for Ambrose P. S. Stuart, Respondent.

Assignment of Errors.

In the Circuit Court of the United States within and for the District of Nebraska.

KENT K. HAYDEN (Receiver), Complainant,
vs.
AMBROSE P. S. STUART *et al.*, Respondent.

And now, to wit, on this 27th day of April, 1895, before the honorable judges of the said circuit court, comes Ambrose P. S. Stuart, by his solicitor, C. C. Flansburg, and says that in the record and proceedings aforesaid, and the said decree rendered, there is manifest error as against the just rights of this respondent for the following reasons:

First. The court erred in holding the said respondent Ambrose P. S. Stuart liable simply because he was a director, although without any actual notice of the condition of the said bank.

Second. The court erred in rendering judgment for the receiver.

Third. The court erred in holding that the said transfer was fraudulent, and made on behalf of the said Stuart with the intent and for the purpose of escaping his statutory liability.

Fourth. The court erred in ordering the said shares of stock to be entered upon the books of the bank in the name of the said Ambrose P. S. Stuart.

Fifth. The court erred in holding that the said transfer was void as to the bank.

Sixth. The court erred in giving any relief to Gruetter & Joers on their cross-bill, as the same was without equity, and did not state facts sufficient to warrant relief in a court of equity.

Seventh. The court erred in rendering a judgment against Ambrose P. S. Stuart and in favor of Gruetter & Joers for the value of said stock.

Eighth. The court erred in denying to respondent Stuart the constitutional right of a jury upon the action for damages alleged in the cross-bill of Gruetter & Joers.

256 Ninth. The court erred in assuming jurisdiction of the said cross-bill brought by Gruetter & Joers against the said respondent Stuart.

Tenth. The court erred in ordering the said respondent Stuart to

pay the value of said stock, thereby making a new contract for the parties.

Wherefore respondent prays that said decree may be reversed and vacated in accordance with the prayer and request in the said respondent's answer herein set forth.

C. C. FLANSBURG,
Solicitor for Respondent Stuart.

4 May, 1895.—Appeal allowed as prayed for above.
ELMER S. DUNDY, *Judge.*

Upon the back of said petition in appeal and assignment of errors appear indorsements in the words and figures following, to wit: In equity. No. 69, "Q." Circuit court of the U. S. for the district of Nebraska. Kent K. Hayden, receiver, complainant, *vs.* Ambrose P. S. Stuart *et al.* Respondents' petition in appeal & assignment of errors. Filed Apr. 30, 1895. Elmer D. Frank, clerk. C. C. Flansburg, att'y for respondent Stuart.

Thereupon afterwards, to wit, on the 4th day of May, 1895, a citation was duly issued in said case, and returned and filed May 6, 1895, the following of which is the original:

THE UNITED STATES OF AMERICA:

To Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska; Augustus T. Gruetter, and Charles F. Joers, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein Ambrose P. S. Stuart is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in
257 said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Elmer S. Dundy, judge of the circuit court of the United States for the district of Nebraska, this 4th day of May, in the year of our Lord one thousand eight hundred and ninety-five.

Seal United States Circuit Court, District of Nebraska.

ELMER S. DUNDY,
United States District Judge for the District of Nebraska.

THE STATE OF NEBRASKA, }
Lancaster County. }

I hereby enter a voluntary appearance in the United States circuit court of appeals in the within case and waive the issuance and service of this citation and notice, and hereby accept service thereon.

KENT K. HAYDEN, *Receiver,*
By CUBB & HARVEY,
His Solicitors.
AMES & PETTIS,
Solicitors for Gruetter & Joers.

No. 69, Q. United States circuit court, district of Nebraska. Ambrose P. S. Stuart *vs.* Kent K. Hayden, receiver, etc. Citation. Filed May 6, 1895. Elmer D. Frank, clerk.

Thereupon afterwards, to wit, on the 11th day of May, 1895, a bond was filed in said case; which said *the* bond is in the words and figures following, to wit:

Know all men by these presents that we, Ambrose P. S. Stuart — Martha E. Stuart, are held and firmly bound unto Kent K. Hayden, as receiver of the Capital National Bank of Lincoln, Nebraska; Augustus T. Gruetter, and Charles F. Joers in the full and just sum of fifty thousand dollars, to be paid to the said Kent K. Hayden, as receiver of the Capital National Bank of Lincoln, Nebraska; Augustus T. Gruetter, & Charles F. Joers, — heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of May, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at the January term, A. D. 1895, of the circuit court of the United States for the district of Nebraska, in a
258 suit depending in said court between Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, plaintiff, and Ambrose P. S. Stuart, Augustus T. Gruetter, & Charles F. Joers, defendants, judgment was rendered against the said Stuart in favor of said Kent K. Hayden, and on the 22nd day of April, and also on same day, a judgment was rendered against said Stuart in favor of Augustus T. Gruetter and the said Charles F. Joers, and the said Stuart has obtained an order allowing appeal of the said court to reverse the judgments & decrees in the aforesaid suit, and a citation directed to the said Kent K. Hayden, as receiver of the Capital National Bank of Lincoln, Nebraska; Augustus T. Gruetter, and Charles F. Joers, citing and admonishing them and each of them to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said Ambrose P. S. Stuart shall prosecute said appeal to effect and answer

all damages and costs if he fails to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

AMBROSE P. S. STUART. [SEAL.]
MARTHA E. STUART. [SEAL.]

Sealed and delivered in presence of—
—— ——.

Approved by—
ELMER S. DUNDY, *Judge.*

11 May, 1895.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

Ambrose P. S. Stuart on his oath says he is the owner of and has standing in his own name farm lands and other real estate in the counties of Lancaster, Seward, Merrick, York, Saunders, and Antelope, in said State, free of encumbrance and liens; that said farm lands are about 1,900 acres, and worth at a cash (valuation) $50,000; that the other real estate is city property in Lincoln, Nebraska; that he is worth over and above all debts, liabilities, and exemptions the sum of $150,000.

AMBROSE P. S. STUART.

Subscribed in my presence and sworn to before me by Ambrose P. S. Stuart this 4th day of May, 1895.

VERNE L. L. LAFFERTY,
[SEAL.] *Notary Public, Lancaster County, Neb.*

No. 69, "Q." United States circuit court, district of Nebraska. Bond. $50,000.00. Filed May 11, 1895. Elmer D. Frank, clerk.

259 THE STATE OF NEBRASKA, } ss:
Lancaster County, }

Martha E. Stuart on her oath says she has standing in her own name free of encumbrance 320 acres in Lancaster county, Neb., 160 acres in Franklin county, Nebraska, and other real estate in the city of Lincoln, Nebraska, consisting of inside & improved property, and personal property consists of secured notes and mortgages. That she is worth over all debts and liabilities and exemptions the sum of $80,000.

MARTHA E. STUART.

Subscribed & sworn to before me by Martha E. Stuart this 4th day of May, 1885.

[SEAL.] VERNE L. LAFFERTY,
Notary Public, Lancaster Co., Neb.

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, do hereby certify that the foregoing

folios from one to four hundred & thirty-eight, contain true and faithful transcripts of all the pleadings and proceedings of record and on file in said court in the case of Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Neb., complainant, *vs.* Ambrose P. S. Stuart, defendant, and August T. Gruetter and Charles F. Joers, copartners as Gruetter and Joers, cross-complainants, *vs.* Ambrose P. S. Stuart *et al.*, defendants, and that a copy of the citation issued therein, duly certified, has been lodged and remains in my said office as such clerk.

Seal United States Circuit Court, District of Nebraska.

Witness my hand and the seal of said circuit court, at Omaha, in said district, this 21st day of June, A. D. 1895.

ELMER D. FRANK, *Clerk.*

Filed Jun- 26, 1895.

JOHN D. JORDAN, *Clerk.*

260 And on the first day of July, A. D. 1895, an appearance of counsel for appellant was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

A. P. S. STUART, Appellant,
vs.
KENT K. HAYDEN, Receiver, *et al.* } No. 666.

The clerk will enter my appearance as counsel for the appellant.

C. C. FLANSBURG,
Counsel for Ambrose P. S. Stuart, Appellant.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1895. No. 666. A. P. S. Stuart, appellant, *vs.* Kent K. Hayden, receiver, *et al.* Appearance. Filed Jul- 1, 1895. John D. Jordan, clerk. C. C. Flansburg, Lincoln, Neb., counsel for appellant.

And on the twenty-eighth day of August, A. D. 1895, an appearance of Mr. G. M. Lambertson as counsel for appellees was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

AMBROSE P. S. STUART, Appellant,
vs.
KENT K. HAYDEN, Receiver, &c., *et al.* } No. 666.

The clerk will enter my appearance as counsel for the appellees.

G. M. LAMBERTSON.

261 Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1895. No. 666. Ambrose P. S. Stuart, appellant,

vs. Kent K. Hayden, receiver, &c., *et al.* Appearance. Filed Aug. 28, 1895. John D. Jordan, clerk. G. M. Lambertson, Lincoln, Neb., counsel for appellees.

And on the thirty-first day of August, A. D. 1895, an appearance of counsel for appellees, Gruetter and Joers, was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

AMBROSE P. S. STUART, Appellant,
vs.
KENT K. HAYDEN, Receiver, &c., *et al.* } No. 666.

The clerk will enter *my* appearance as counsel for the appellees, Gruetter & Joers.

JOHN H. AMES &
E. F. PETTIS.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1895. No. 666. Ambrose P. S. Stuart, appellant, *vs.* Kent K. Hayden, receiver, &c., *et al.* Appearance. Filed Aug. 31, 1895. John D. Jordan, clerk. John H. Ames, E. F. Pettis, Lincoln, Neb., counsel for appellees.

And on the fourth day of September, A. D. 1895, an appearance of Amasa Cobb and A. E. Harvey, as counsel for appellees, was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

AMBROSE P. S. STUART, Appellant,
vs.
KENT K. HAYDEN, Receiver, &c. } No. 666.

The clerk will enter *my* appearance as counsel for the appellees.

AMASA COBB.
A. E. HARVEY.

262 Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1895. No. 666. Ambrose P. S. Stuart, appellant, *vs.* Kent K. Hayden, receiver, &c. Appearance. Filed Sep. 4, 1895. John D. Jordan, clerk. Amasa Cobb, A. E. Harvey, Lincoln, Neb., counsel for appellees.

And on the twenty-first day of October, A. D. 1895, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

MONDAY, *October* 21, 1895.

AMBROSE P. S. STUART, Appellant,
vs.
KENT K. HAYDEN, Receiver of the Capital National Bank, *et al.*, Appellees. } No. 666.

Appeal from the circuit court of the United States for the district of Nebraska.

This cause having been called for hearing in its regular order, argument was commenced by Mr. C. C. Flansburg for appellant, continued by Mr. G. M. Lambertson for the receiver, and by Mr. John H. Ames for Gruetter and Joers, appellees, and concluded by Mr. C. C. Flansburg for appellant.

Thereupon this cause was submitted to the court on the transcript of record from said circuit court and the briefs of counsel filed herein.

And on the thirtieth day of December, A. D. 1895, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

263 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1895.

AMBROSE P. S. STUART, Appellant,
vs.
KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska; Augustus T. Gruetter, and Charles F. Joers, Appellees. } No. 666. Appeal from the Circuit Court of the United States for the District of Nebraska.

Mr. C. C. Flansburg for appellant.

Mr. G. M. Lambertson (Mr. F. M. Hall, Mr. Amasa Cobb, and Mr. A. E. Harvey were with him on the brief) for appellee, Hayden, receiver.

Mr. John H. Ames for appellees Gruetter and Joers.

Before Caldwell, Sanborn, and Thayer, circuit judges.

Statement.

On December 23, 1892, the Capital National Bank of Lincoln, Nebraska, was, and for eight years theretofore had been, a national banking association incorporated and doing business as such under the acts of Congress relative to national banks. It had a nominal capital of three hundred thousand dollars. On January 23, 1893, this banking association failed, and in March of that year Kent K. Hayden, one of the appellees, was appointed receiver of this bank by

the Comptroller of the Currency of the United States. When the bank failed in January, 1893, its assets were about nine hundred thousand dollars and its liabilities over fourteen hundred thousand dollars. From the year 1885 until its failure it had frequently suffered heavy losses. During this time it had accumulated worthless paper to the amount of more than three hundred thousand dollars and more than fifty thousand dollars of its capital had been tied up in real estate. The appellees Augustus T. Gruetter and
264 Charles F. Joers were copartners engaged in the furniture business at Lincoln, in the State of Nebraska, under the firm name of Gruetter & Joers. They owned a building in Lincoln and the ground on which it stood, which they traded to the appellant, Ambrose P. S. Stuart, for $67,500, on December 23, 1892. The appellant Stuart had been a stockholder and director of this banking association for many years, and was on December 23, 1892, the chairman of the finance committee of its board of directors. On that day he bought of Gruetter and Joers their building and the land on which it stood for the sum of $67,500, and paid for it by assuming a mortgage of $30,000 thereon, by transferring to them one hundred and fifty shares of the stock of this bank of the par value of $15,000, for the agreed price of $18,000, and by giving them about $19,500 in cash. On June 10, 1893, the Comptroller of the Currency of the United States found that in order to pay the debts of this banking association it was necessary to enforce the individual liability of its stockholders under section 5151 of the Revised Statutes, and thereupon he made an assessment upon the shareholders of the bank of an amount equal to the par value of the stock held by them respectively, and directed the receiver, Hayden, to enforce this liability by suit if necessary. The receiver thereupon exhibited his bill in the court below against the appellant Stuart, in which he alleged that the transfer of his stock on December 23, 1892, was made with a knowledge of the failing condition and insolvency of the bank, for the purpose of defrauding its depositors and creditors and of escaping from the liability imposed upon him by section 5151 of the Revised Statutes; that the transferees, Gruetter and Joers, were irresponsible and unable to discharge the liability imposed by the ownership of the stock, and he prayed that the transfer might be held void as to the creditors and depositors of the bank and the receiver and that the latter might recover of the appellant Stuart the fifteen thousand dollars assessed upon this stock. Stuart interposed a demurrer on the ground, among others, that Gruetter and Joers were not made parties to the bill. This demurrer was sustained with leave to amend, and an amended bill was filed in which Gruetter and Joers were made parties to the suit and substantially the same allegations as in the original bill were reiterated. Stuart answered this bill, admitted the trade of the stock for the real estate, but denied that this trade was made for the purpose of defrauding the creditors or depositors of the bank or for the purpose of escaping his individual liability. The defendants Gruetter and Joers answered. Their answer was in effect an admission of the averments of the bill. After this answer had been filed, they prayed

and obtained permission to file a cross-bill. In their cross-bill they alleged in substance that they were induced to make this trade by the false representations of the value of the stock and the financial condition of the bank made to them by the appellant Stuart, and they prayed that the transfer and assignment of the stock might be wholly canceled and set aside by decree of the court; that they might be released from any liability by reason thereof, and
265 that Stuart might be adjudged to make a full restitution to them of the sum of eighteen thousand dollars paid by them to him for the purchase of said stock by the conveyance of their block, but they did not tender or offer to restore to him the nineteen thousand five hundred dollars in cash, which they had received as a part of the purchase price of the block, or to cause him to be released from his obligation to pay the mortgage of thirty thousand dollars which was secured thereon. The appellant, Stuart, demurred to this cross-bill on the grounds, among others, that the bill did not state such a case as in any manner constituted a defense to the original bill or a ground for any relief against the complainant in that bill, and that it attempted to litigate an independent matter between the respondents to the original bill without interposing this matter as a defense to the original bill and without in any way connecting the subject-matter of the cross-bill with the matter set forth in the original bill. The court overruled this demurrer, testimony was taken, and after final hearing the court entered a decree: first, that the transfer of the one hundred and fifty shares of stock from the appellant Stuart to the appellees Gruetter and Joers was void as against the receiver, Kent K. Hayden, and that Stuart should pay to the receiver the full amount of the assessment upon that stock, together with interest thereon at seven per cent. per annum from the 10th day of July, A. D. 1893; and, second, that the transfer of said stock was void as against the appellees Gruetter and Joers; that it should be set aside, canceled and held for naught; that the stock should be reinstated upon the books of the Capital National bank in the name of Stuart, and that said Stuart should pay to the appellees Gruetter and Joers eighteen thousand dollars with interest at seven per cent. from the third day of January, 1893. Stuart appealed to this court from this decree.

SANBORN, J., after stating the facts as above, delivered the opinion of the court:

The capital, the unpaid subscriptions to the capital stock, and the liability of the holders of stock, that is paid for, to pay an additional amount equal to the par value of their stock under section 5151 Revised Statutes, are all parts of a trust estate sacredly pledged for the security of the creditors of a national banking association organized under the national banking acts. The wilful destruction or diminution of any part of this trust estate, or the diversion of the proceeds of any of it from the creditors of the bank, is a fraud upon these creditors, and subjects its perpetrator to a suit by them or their legal representative for proper relief. Hayden *v.* Thompson *et al.* (decided

at the present term), — Fed. Rep., —, and cases cited; Peters *v.* Bain, 133 U. S., 670, 690.

A shareholder of a national banking association, who, for the purpose of escaping his individual liability under section 5151 of the Revised Statutes, transfers his shares in a failing bank to one who, for any reason, is unable to respond, as promptly and effectually as he was, to the liability their ownership imposes, commits a
266 fraud upon the creditors of the bank, renders his transfer voidable at their election and leaves himself subject to the individual liability imposed by the ownership of the stock if the creditors elect to pursue him. National Bank *v.* Case, 99 U. S., 628, 630, 632; Peters *v.* Bain, *supra;* Bowden *v.* Johnson, 107 U. S., 251, 261; Cook on Stockholders, sec. 265; Johnson *v.* Laflin, 5 Dillon, 65, 86; Davis *v.* Stevens, 7 Fed. Cas., 177, case No. 3653; Nathan *v.* Whitlock, 9 Paige's Ch. (N. Y.) 152; McClaren *v.* Franciscus, 43 Mo. 452; Marcy *v.* Clark, 17 Mass. 329.

After this bank had failed and this receiver had been appointed he was the proper party to, and the only party who could maintain a suit on behalf of the creditors of this bank to set aside the fraudulent transfer referred to in the bill and to enforce the individual liability of Stuart. Hayden, receiver, *v.* Thompson, *supra;* Bailey *v.* Mosher, 63 Fed. Rep., 488, 491; National Bank *v.* Colby, 21 Wall., 609; Hornor *v.* Henning, 93 U. S., 228; Stephens *v.* Overstoltz, 43 Fed. Rep., 771; National Exchange Bank *v.* Peters, 44 Fed. Rep., 13.

These propositions are too well settled to warrant more extended notice than their statement. By them the right of the receiver Hayden to enforce the individual liability under section 5151 against the appellant Stuart must be governed.

In order to determine whether or not this receiver was entitled to enforce this liability the court below was required to answer two questions, and two questions only. They were: (1) Did Stuart make this transfer of his stock to Gruetter and Joers on December 23, 1892, with knowledge, or with such notice as would if pursued with reasonable diligence have given him knowledge, that the bank was insolvent or its failure impending, and for the purpose of escaping from his individual liability on the stock? And (2) Did the transfer cause any damage to the creditors of the bank? The trial court after considering the evidence submitted answered both these questions in the affirmative, and the only question remaining for us to consider upon this branch of the case is whether there was sufficient testimony to fairly warrant these conclusions.

The record discloses these facts: The appellant, Stuart, was on December 23, 1892, and had been for many years, a stockholder, a director, and a member of the finance committee of the board of directors of this bank. He was in almost daily attendance at the bank's office and he occasionally examined some of its bills receivable. He owned one hundred and fifty shares of its stock of the par value of fifteen thousand dollars, and he had ten thousand three hundred dollars on deposit in its vaults. He was an intelligent, educated gentleman, a retired professor of chemistry, who had been

devoting his time and attention to loaning money and acting as a director of a bank. The bank had a nominal capital of three hundred thousand dollars, and for six years it had constantly paid semi-annual dividends on its stock. It had had many losses and heavy ones, but prior to February 2, 1892, no bad debts had been charged off, and on that day only $21,402.46 was charged off on ac-
267 count of bad debts, while only thirty thousand dollars of a surplus of about thirty-four thousand dollars was also stricken off. At the time the transfer of this stock was made in December, 1892, the bank had about seventy thousand dollars of overdue paper, and its books showed that it held about one hundred thousand dollars of overdue paper that it did not have at all. When the bank failed on January 23, 1893, one month after this transfer, its total assets were about nine hundred thousand dollars and its total liabilities were $1,463,016.17. $660,600 of these assets were bills receivable. Of these, bills to the amount of $68,596.82 were good, bills to the amount of $141,393.27 were doubtful, and bills to the amount of $319,611.90 were worthless. The bank had met with early, frequent, and disastrous losses. It had lost $20,300 by the failure of Donnell, Lawson & Simpson in 1885. Stuart was aware of this failure and knew that there was a loss by it, but did not know the amount of the loss and did not examine the books to learn how heavy it was. It had lost $14,000 by the failure of the Sherman County Banking Company. Stuart knew that there was such a loss, but did not know its amount. It held defaulted paper to the amount of $40,000 or $50,000 which resulted from the failure of a banker named Small at Edgar, Nebraska, about 1886. Stuart knew that this loss had been made, but did not know its amount and had been told by some of the officers of the bank that the latter had obtained real estate enough to nearly even it up. The bank held bogus and worthless paper of the Western Manufacturing Company, signed by "E. Hurlbut, Jr., manager," to the amount of about $125,000 when it failed in January, 1893. Two or three months before the transfer of this stock the appellant, in the discharge of his duties as a member of the board of directors and as chairman of its finance committee, had examined the bills receivable of the bank, but he could not remember whether there was then as much as one hundred thousand dollars of this paper in the bank, or whether or not there was any of it in the bank. One witness testified that at the time Stuart was negotiating for the purchase of the block from Gruetter & Joers, he told him that the price of the block in the trade was to be $67,500, and that he should trade in his bank stock if he traded at all. In answer to the remark of the witness that $67,500 was an exorbitant price and that he should rather have the bank stock, that he thought it better and safer, Stuart replied, "Well, we have to take some risk," and said that he did not like the way the officers of the bank were doing business; that he did not like the style; that a large share of the bank's capital was tied up in real estate, and that there was no prospect of dividends and he preferred to do his own business and manage his own affairs. Another witness testified that on the morning that the bank failed, in January, 1893, he told

her that he had not liked the management of the bank and had felt anxious about it for a long time; that he did not like the manager's going into the Western Manufacturing Company business and the stave business in Arkansas; that from that they went into the skating-rink business, and that when they went into the base-ball business he told them that they must stop and do a banking business.
268 This witness further testified that Stuart then told her that the capital of the bank was impaired and that he had known for quite a while that they had some bad debts, such as very poor paper there, amounting to about one hundred and thirty-six thousand dollars. When the appellant was interrogated regarding these conversations, his answer was substantially the same as that which he gave to the questions relative to his knowledge of the financial affairs of the bank, that he did not remember what was said, although he remembered the fact that he had had the conversations. This, then, is the record. A national bank which has a nominal capital of three hundred thousand dollars has made such losses that its assets are worth but nine hundred thousand dollars while its debts are more than fourteen hundred thousand dollars. It has $660,600 of bills receivable, over three hundred thousand dollars of which are worthless. A director of several years' standing, the chairman of the finance committee of its board of directors, whose business it is to examine and know the value of its assets and the amount of its liabilities, who did examine its bills receivable two or three months before this transfer, who knew that the bank had made heavy losses but did not know and did not examine the books to learn how heavy, who disliked the management and had long been anxious about it, who knew that there was no prospect of the bank's paying more dividends, that its capital was impaired, and that its managers had been in the stave business, the skating-rink business and the base-ball business against his protest, that a large portion of its capital was tied up in real estate, and that it had one hundred and thirty-six thousand dollars of very poor paper, transferred his stock at a premium of twenty per cent., and drew $10,300 in money that he had on deposit in the vaults of this bank to pay it to third parties in a trade for a building subject to a mortgage of thirty thousand dollars only thirty days before the bank disastrously failed. Upon this record the court below found that the transfer was made for the purpose of escaping the individual liability imposed by the ownership of the stock, notwithstanding the fact that the appellant himself testified that he had no such intention, that he supposed that the bank was solvent, and notwithstanding the fact that the proof was uncontradicted that the trade was proposed and sought, not by him, but by Gruetter and Joers.

When the court has considered conflicting evidence, and made its finding and decree thereon, they must be taken to be presumptively correct, and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. Warren *v.* Burt, 12 U. S. App., 591, 600; 7 C. C. A., 105, 110; 58 Fed. Rep., 101, 106; Paxson *v.* Brown, 27 U. S. App., 29,

62; 10 U. S. App., 135, 144; 61 Fed. Rep., 874, 883; Kimberly *v.* Arms, 129 U. S., 512; Evans *v.* Bank, 141 U. S., 107; Furrer *v.* Ferris, 145 U. S., 132, 134.

After a careful examination of this evidence we are unwilling to hold that the trial court committed any mistake in the con-
269 sideration of the evidence applicable to the question under consideration or in the conclusion which it deduced therefrom. On the other hand, the facts and circumstances in evidence, in our opinion, well warranted the answer to this question given by the court below and would have led us to the same conclusion upon a trial *de novo*.

The second issue determined by the court below was whether or not the transfer of the stock caused any damage to the creditors of the bank. It is insisted by counsel for appellant, Stuart, that there could be no fraud upon the creditors of the bank unless the transfer was made to parties who were insolvent before the transfer was made; but this position is untenable. Suppose that Stuart had transferred his stock for eighteen thousand dollars to one who owed no debts and who was worth exactly eighteen thousand dollars, and the latter had paid him that amount for the stock; the result would have been that although the transferee was perfectly solvent before the transfer was made, he would have been utterly insolvent after it was effected and unable to pay a dollar upon the individual liability of fifteen thousand dollars which the ownership of the stock imposed. The creditors would have sustained the same damage as if the transfer had been made to one who was insolvent before he received it, and consequently the fraud upon them would have been the same in character and the same in effect. The question was not, therefore, whether the transferees were solvent or insolvent at the time of the transfer, but whether or not the individual liability of the transferees was as valuable as was that of the transfer-er. If it was not, the creditors were damaged and the fraud was actionable. The evidence leaves this question without doubt. Stuart was solvent and amply able to pay the fifteen thousand dollars in full and at once. Gruetter and Joers were solvent before, but insolvent and unable to pay the liability after the transfer. They paid to Stuart eighteen thousand dollars of their property for his stock which was worth nothing, and which imposed upon them a liability of fifteen thousand dollars. The operation decreased their assets eighteen thousand dollars and increased their liabilities fifteen thousand dollars. It diminished the net value of their estate thirty-three thousand dollars. This made them insolvent and rendered them unable to pay their individual liability on the stock in full. There was no error, therefore, in the answer given by the court to the second question, and that part of the decree which adjudged that the transfer of this stock was fraudulent and voidable as to the creditors of the bank and the receiver who represents them and that the receiver was entitled to recover of the appellant the fifteen thousand dollars assessed upon this stock by the Comptroller of the Currency, was right.

But were the appellees Gruetter and Joers entitled to a decree in this suit against their codefendant Stuart for the avoidance of the

transfer of the stock and the recovery of its estimated value in the trade for the real estate, on the grounds set forth in the paper which they style a "cross-bill"? Before entering upon the discussion of this question, let us, if possible, get a clear conception of the
270 character of this transfer and the relation to it of the parties represented in this suit. The creditors of the bank and their representative, the receiver, assert that this transfer was made by Stuart to escape his individual liability upon the stock, that they were damaged by the transfer, and that, therefore, it should be avoided as to them, and we have so held. But these facts furnish no ground for setting aside the transfer as to the transferees Gruetter and Joers. They allege in their bill, however, that they were induced to purchase and accept the transfer of the stock by fraudulent misrepresentations as to its value and as to the financial condition of the bank which Stuart made to them, and that on that ground the transfer should be set aside as to them. But these allegations, if well founded, would not authorize any court to set aside the transfer at the suit of the creditors or of the receiver. Such a transfer of stock may be valid as to the creditors and receiver and voidable as to the transferees (Florida Land & Imp. Co. *v.* Merrill, 52 Fed. Rep., 77, 81), and it may be valid as to the transferees and voidable as to the creditors and the receiver. Bowden *v.* Johnson, 107 U. S., 251, 261. Again, when this transfer had been completed and recorded in the books of the bank, it was not void as to any one. It was merely voidable at the election of those whom it defrauded. It was valid until disaffirmed, not void until affirmed. Oakes *v.* Turnquand, L. R. 2 H. L., 325, 344; Reese River Silver Mining Co. *v.* Smith, L. R. 4 H. L., 64; Upton *v.* Englehart, 3 Dillon, 496, 504.

Each one of those defrauded by this transfer, upon his discovery of the fraud, had the right to disaffirm this transaction, but silence or acquiescence affirmed it. It follows that some of those defrauded might affirm, while others might repudiate. The transfer then was valid as to all the parties to this suit until each disaffirmed it. The receiver disaffirmed it and filed his bill to avoid it as to himself and to collect of Stuart the assessment upon the stock transferred, on the ground that he had transferred it to escape his individual liability to the damage of the creditors of the bank. Stuart by his answer denied the material allegations of this bill. Gruetter and Joers answered that the allegations of the bill were true and consented that the relief for which it prayed should be granted. The question recurs: Were they, after they had made this answer, entitled, upon filing a pleading in this suit which alleged that the transfer of the stock was voidable as to them because they were induced to trade for it by the fraudulent misrepresentations of Stuart, to a decree that the transfer should be set aside as to them, that they were not liable for the assessment on the stock, and that they should recover of Stuart the amount which the stock was estimated to be worth in the trade?

A cross-bill is brought either to aid in the defense of the original suit or to obtain a complete determination of the controversies between the original complainant and the cross-complainant over the

subject-matter of the original bill. If its purpose is different from this, it is not a cross-bill although it may have a connection with the general subject of the original bill. It may not interpose
271 new controversies between codefendants to the original bill, the decision of which is unnecessary to a complete determination of the controversies between the complainant and the defendants over the subject-matter of the original bill. If it does so, it becomes an original bill and must be dismissed because there cannot be two original bills in the same case. Story's Equity Pleading, sec. 389; Cross *v.* De Valle, 1 Wall., 1, 14; Ayres *v.* Carver, 17 How., 591; Rubber Company *v.* Goodyear, 9 Wall., 807, 809; Stonemetz Printers' Machine Co. *v.* Brown Folding-machine Co., 46 Fed. Rep., 851; Fidelity Trust & Safety Vault Co. *v.* Mobile Street R'y Co., 53 Fed. Rep., 850, 852; McMullen *v.* Ritchie, 57 Fed. Rep., 104.

Tested by these rules, the pleading filed by Gruetter and Joers was not a cross-bill. It was not brought in aid of their defense to the original suit, for they had none. They confessed the allegations of the original bill. It was not necessary in order to obtain a complete determination of the controversies between the complainant and the defendants in the original suit over the subject-matter of the original bill—the liability for the assessment on this stock—for those issues must necessarily be completely disposed of by the decision of that suit. If, as the receiver claimed it should be, the transfer of the stock was avoided as to him by the decree in that suit, that would discharge Gruetter and Joers from all liability for the assessment upon the stock, for the transfer could not be void as to the receiver and impose a liability upon Stuart and valid as to the receiver and impose one upon Stuart's transferees at the same time. This pleading of Gruetter and Joers attempted to bring into this suit a new and independent controversy between the codefendants in the original suit, the decision of which depended upon facts not material to the issues between the complainant and any of the defendants, while the decision of the latter issues depended upon facts not essential to the determination of the new controversy between the codefendants which this pleading sought to import. It contained none of the essentials of a cross-bill and every characteristic of an original bill, except the statement of a cause of action, and that exception did not aid its sufficiency as a cross-bill. The demurrer to it should have been sustained.

There is another reason why this supposed cross-bill should be dismissed. Gruetter and Joers neither pleaded nor proved in this case a state of facts which would entitle them in any court to the rescission of the transfer of the stock and the recovery of its purchase price, which they asked in this pleading and obtained by this decree. They obtained this stock by this trade. They exchanged with Stuart a single piece of real estate in the city of Lincoln which they owned for this stock, nineteen thousand five hundred dollars in cash and the agreement of Stuart to pay a mortgage of thirty thousand dollars which they owed. They have sought in this suit, and the court below has granted to them by this decree, a rescission of the transfer of the stock and its reinstatement upon the books of the bank

in the name of Stuart and a recovery from him of eighteen thousand dollars, the value at which the parties estimated the stock in
272 the trade, with interest, while they still retained the nineteen thousand five hundred dollars in cash and the agreement of Stuart to pay the mortgage of thirty thousand dollars, and he retains the real estate. This part of this decree is a perfect *non sequitur*. Conceding that Gruetter and Joers were induced to make this trade by the fraudulent misstatements of Stuart, they could not rescind it in the part which was burdensome and affirm it in the part which was beneficial to them. They could not rescind it as to the stock and affirm it as to the cash. They must either rescind or affirm it altogether. One who is induced to make a sale or trade by the deceit of his vendee has a choice of two remedies upon his discovery of the fraud. He may affirm the contract and sue for his damages, or he may rescind it and sue for the property he has sold. The former remedy counts upon and affirms the validity of the transaction; the latter repudiates the transaction and counts upon its invalidity. The two remedies are utterly inconsistent, and the choice of one rejects the other, because a sale cannot be valid and void at the same time. Now the supposed cross-bill of Gruetter and Joers and the proof in this record show that they elected to affirm and did affirm the contract and sue for damages for the deceit, and these facts conclusively estop them from obtaining any relief on the ground of rescission. The sale or exchange was valid until disaffirmed. Upon the discovery of the fraud, they could not, if they would, avoid an immediate choice of an affirmance or a repudiation of the trade. If one who is induced to make a trade or sale by fraud would rescind it, he must immediately, upon his discovery of the fraud, announce his intention so to do, and return all the consideration he has received, to the end that the parties may be put *in statu quo* before subsequent transactions have made such action impossible. Silence, delay, vacillation, acquiescence, or the retention and use of any of the fruits of the sale or trade that are capable of restoration, for any considerable length of time after the discovery of the fraud, constitute a complete and irrevocable ratification of the transaction. Rugan *v.* Sabin, 10 U. S. App., 519, 531; 3 C. C. A., 578, 580; 53 Fed. Rep., 415, 418; Kinne *v.* Webb, 12 U. S. App., 137, 144; 4 C. C. A., 170, 174; 53 Fed. Rep., 34, 38; Scheftel *v.* Hays, 19 U. S. App., 220, 226; 7 C. C. A., 308, 312; 58 Fed. Rep., 457, 460; McLean *v.* Clapp, 141 U. S., 429; Grymes *v.* Sanders, 93 U. S., 55, 62.

The supposed cross-bill utterly fails to state a case for rescission because it does not show that Gruetter and Joers ever returned to Stuart the nineteen thousand five hundred dollars in cash which they received from this trade, or that they ever released Stuart from his agreement to pay the mortgage of thirty thousand dollars upon the property they conveyed. They could not rescind this trade and recover back that which they gave in exchange, or any part of it, while they retained at least forty-nine thousand five hundred dollars in value that they had received from it. The proof, if it were possible, is more fatal to them than the pleading. The record dis-

closes the fact that they made their election and chose to affirmatively ratify this transaction more than a year before they
273 filed this bill for its rescission. It shows that on January 23, 1893, they brought an action at law against Stuart in one of the courts in the State of Nebraska to recover of him damages to the amount of eighteen thousand dollars for his fraudulent misrepresentation of the value of this stock at the time of the trade. This was in effect an action for a part of the purchase price of the real estate which they had conveyed, although it was in form an action for deceit. It could be brought and maintained on the ground that the sale or trade of the real estate was valid and its title was vested in Stuart, and on no other theory. That suit is still pending. It was a distinct and affirmative ratification of the transfer of this stock, and the conveyance of the real estate, after full knowledge of all the facts, and it barred Gruetter and Joers of all right to rescind the trade thereafter. The result is that all that portion of the decree which grants to Gruetter and Joers any relief against the appellant Stuart was wrong.

The decree below must a rdingly be reversed without costs to either party, and the case n t be remanded to the court below, with instructions to enter a ecree to the effect that the transfer of the one hundred and fifty shares of stock from Stuart to Gruetter and Joers was fraudulent and voidable as to the receiver Hayden, that it be held for naught as to him, and that he recover of Stuart the assessment levied thereon, with his costs; that the appellees, Gruetter and Joers, are entitled to no relief against Stuart in this suit; that their supposed cross-bill be dismissed, and that Stuart recover of them his costs thereon. It is so ordered.

Filed December 30, 1895.

274 And on the thirtieth day of December, A. D. 1895, in the record of the proceedings of said circuit court of appeals is a decree in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1895.

MONDAY, *December* 30, 1895.

AMBROSE P. S. STUART, Appellant, *vs.* KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska; Augustus *F.* Gruetter, and Charles F. Joers, Appellees.	No. 666.

Appeal from the circuit court of the United States for the district of Nebraska.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Nebraska and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and

decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed without costs to either party in this court.

It is further ordered that this cause be, and the same is hereby, remanded to the said circuit court, with directions to enter a decree to the effect that the transfer of the one hundred and fifty shares of stock from Stuart to Gruetter and Joers was fraudulent and voidable as to the receiver, Hayden; that it be held for naught as to him, and that he recover of Stuart the assessment levied thereon, with his costs; that the appellees Gruetter and Joers are entitled to no relief against Stuart in this suit; that their supposed cross-bill be dismissed, and that Stuart recover of them his costs thereon.

December 30, 1895.

275 And on the twentieth day of February, A. D. 1896, there was filed in the clerk's office of said circuit court of appeals a petition for and order allowing appeal and assignment of errors in the words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

AMBROSE P. S. STUART, Appellant,
vs.
KENT K. HAYDEN, Receiver, *et al.*, Appellees.

STATE OF NEBRASKA, *Lancaster County,* } *ss:*

Ambrose P. S. Stuart, being first duly sworn, deposes and says that the amount in controversy in the above-entitled cause exceeds, exclusive of interests and costs, the sum of five thousand dollars ($5,000.00).

AMBROSE P. S. STUART.

Subscribed in my presence and sworn to before me this 19th day of February, A. D. 1896.

[SEAL.]

R. O. WILLIAMS,
Notary Public.

In the United States Circuit Court of Appeals, Eighth Circuit.

AMBROSE P. S. STUART, Appellant,
vs.
KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska; Augustus T. Gruetter, and Charles F. Joers, Appellees.

In Equity. No. 666.

The above-named appellant, Ambrose P. S. Stuart, conceiving himself aggrieved by the decree and opinion made, filed, and entered on the 30th day of December, 1895, in the above-entitled cause, does hereby appeal from said finding, order, and decree to the
276 Supreme Court of the United States for the reasons and on the grounds specified in the assignments of error filed here-

with, and he prays that this his appeal may be allowed; that the transcript of the record, proceedings, and papers upon which said order and judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated February 19th, 1896.

C. C. FLANSBURG,
Counsel for Appellant Stuart.

The foregoing claim of appeal is this day allowed.

(Signed) HENRY C. CALDWELL,
Circuit Judge.

Dated February 20, 1896.

In the United States Circuit Court of Appeals, Eighth Circuit.

AMBROSE P. S. STUART, Appellant,
vs.
KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska; Augustus T. Gruetter, and Charles F. Joers, Appellees.

Assignments of Error.

Now, on the 19th day of February, 1896, comes the said appellant, Ambrose P. S. Stuart, by C. C. Flansburg, his counsel, and says that the decree, finding, opinion, and judgment in said cause is erroneous and against the just rights of appellant Stuart, for the following reasons:

1. The court erred in holding the said appellant, Stuart, liable simply because he was a director and ought to have known, when in fact he had no actual notice of the condition of said bank.

2nd. The court erred in rendering judgment for the receiver and holding the appellant Stuart liable on said assessment levied by the comptroller.

277 3rd. The court erred in holding that said transfer was fraudulent and made on behalf of said Stuart with the intent and for the purpose of escaping his statutory liability.

4th. The court erred in holding that the said transfer was voidable as to the bank after it had found that the transferrees were solvent at the time of the transfer.

5th. The court erred in reversing the case and ordering a decree to be entered against Ambrose P. S. Stuart, thus and thereby making a new contract for the parties.

6th. The court erred in holding that said transfer was voidable as to the bank after it had expressly found that the transfer was valid as to the transferrees, and that they had by affirmative action confirmed the validity of said transfer.

7th. The court erred in not directing the receiver to collect from Gruetter & Joers, the transferrees, the amount of the assessment, it appearing that they were at the time of the bringing of the suit possessed of large amounts of personal property, more than sufficient to pay the assessment levied by the comptroller, and it also appear-

ing that Gruetter & Joers, the transferrees, with full knowledge of all the facts, had confirmed the validity of the transfer.

8th. The court erred in not awarding to the appellant Stuart his costs in reversing the decree of the court below, the circuit court having held that the transfer was void as to the bank having ordered a transfer of the shares of the stock to be entered upon the books of the bank in the name of Ambrose P. S. Stuart, when in fact, at the most, said transfer was only voidable, and the court had no jurisdiction to award the entering of said transfer upon the books of the bank, and this decree being erroneous, and so found by the circuit court upon a reversal thereof, appellant should recover his costs.

Wherefore the said appellant prays that the said decree be reversed; that the said court may be directed to enter a decree
278 relieving said appellant from all liability by reason of the transfer of said stock and awarding to him his costs.

C. C. FLANSBURG,
Counsel for Appellant.

Endorsed: No. 666. In the U. S. circuit court of appeals, 8th circuit. Ambrose P. S. Stuart, appellant, *vs.* Kent K. Hayden, receiver, *et al.*, appellees. Petition for and order allowing appeal to Supreme Court U. S. and assignments of error. Filed Feb. 20, 1896. John D. Jordan, clerk. C. C. Flansburg, counsel for appellant.

And on the fourth day of March, A. D. 1896, there was filed in the clerk's office of said circuit court of appeals a supersedeas bond on appeal in the words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

AMBROSE P. S. STUART, Appellant,
vs.
KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska; Augustus T. Gruetter, and Charles F. Joers, Appellees.

Bond.

Know all men by these presents that we, Ambrose P. S. Stuart, as principal, and Martha E. Stuart and E. R. Smith, as surety, are held and firmly bound unto the appellees in the full and just sum of twenty thousand dollars ($20,000.00), to be paid to the said appellees, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of February, on the year of our Lord one thousand eight hundred and ninety-six.

279 Whereas lately, at the December term, A. D. 1895, of the United States circuit court of appeals for the eighth circuit, in a suit pending in said court between Ambrose P. S. Stuart, appellee, and Kent K. Hayden, as receiver of the Capital National Bank of Lincoln, Nebraska; Augustus T. Guetter, and Charles F. Joers,

appellees, a decree was rendered reversing the judgment and decree of the circuit court of the United States within and for the district of Nebraska, entered on the 23rd day of April, 1895, by which finding and judgment of the circuit court of appeals it was ascertained that there was error in said proceedings and the cross-bill of Gruetter & Joers was dismissed, and the judgment and decree of the circuit court of appeals determined that appellant was liable to pay the sum of fifteen thousand dollars ($15,000.00) to the said appellee, Kent K. Hayden, as receiver, and the said appellant, Ambrose P. S. Stuart has obtained an order allowing an appeal to reverse the said decree and a citation directed to the said appellees, citing and admonishing them and each of them to be and appear in the Supreme Court of the United States, to be holden in the city of Washington, on the — day of —— next:

Now, the condition of the above obligation is such that if the said Ambrose P. S. Stuart shall prosecute said appeal to effect and answer all damages and costs if he fails to make good his plea, then the above obligation to be void; else to be and remain in full force and virtue.

[SEAL.]

AMBROSE P. S. STUART.
MARTHA E. STUART.
E. R. SMITH,
PHILIP MANGER.

Signed and delivered in presence of—
R. O. WILLIAMS.

March 4, 1896, approved to operate as a supersedeas.
(Signed) HENRY C. CALDWELL,
U. S. Circuit Judge.

280 STATE OF NEBRASKA, } ss:
Lancaster County, }

Martha E. Stuart on her oath says that she has standing in her own name, free of encumbrance, three hundred and twenty acres of land in Lancaster county, Nebraska; one hundred and sixty acres of land in Franklin county, Nebraska, and real estate in the city of Lincoln, Nebraska, consisting of inside and improved property, and that she has personal property consisting of secured notes and mortgages; that she is worth, over all debts, liabilities, and exemptions, the sum of eighty thousand dollars ($80,000.00).

MARTHA E. STUART.

Subscribed and sworn to before me by Martha E. Stuart this 19th day of February, A. D. 1896.

R. O. WILLIAMS,
Notary Public.

[SEAL.]

STATE OF NEBRASKA, } ss:
Lancaster County, }

Ambrose P. S. Stuart on his oath says that he is the owner and has standing in his own name farm lands and real estate in the

counties of Lancaster, Seward, Merrick, York, Saunders, and Antelope, in said State; that said farm lands consist of nineteen hundred acres and are worth at a cash valuation $50,000; that he has other real estate in Lincoln, Nebraska, and that he is worth, over and above all debts and exemptions, the sum of one hundred thousand dollars ($100,000.00).

AMBROSE P. S. STUART.

Subscribed and sworn to before me by Ambrose P. S. Stuart this 19th day of February, A. D. 1896.

R. O. WILLIAMS,
[SEAL.] *Notary Public.*

281 STATE OF NEBRASKA, } ss:
Lancaster County, }

E. R. Smith, being first duly sworn, says that he has standing in his own name real estate, bank stock, cash, notes, and accounts, and is worth, over and above his debts and exemptions, the sum of ten thousand dollars ($10,000.00).

E. R. SMITH.

Subscribed in my presence and sworn to before me this 29th day of February, A. D. 1896.
My com. expires Nov. 17, 1898.

W. M. MORNING,
[SEAL.] *Notary Public.*

STATE OF NEBRASKA, } ss:
Lancaster County, }

Philip Manger, being first duly sworn, says that he is worth, over and above his debts, exemptions, and liabilities, the sum of ten thousand dollars ($10,000.00).

PHILIP MANGER.

Subscribed in my presence and sworn to before me this 2nd day of Febr'y, A. D. 1896.

R. S. MOCKETT,
[SEAL.] *Notary Public.*

Endorsed: In the U. S. circuit court of appeals, 8th circuit. Ambrose P. S. Stuart, appellant, *vs.* Kent K. Hayden, receiver, *et al.*, appellees. Supersedeas bond on appeal. Filed Mar. 4, 1896. John D. Jordan, clerk. C. C. Flansburg, counsel for appellant.

And on the fourth day of March, A. D. 1896, a citation on appeal was filed in the clerk's office of said circuit court of appeals in said cause, the original of which, with the acceptance of service endorsed thereon, is hereto attached and herewith returned.

282 THE UNITED STATES OF AMERICA:

To Kent K. Hayden, as receiver of the Capital National Bank of Lincoln, Nebraska; Augustus T. Gruetter, and Charles F. Joers, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, District of Columbia, thirty days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein Ambrose P. S. Stuart is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Henry C. Caldwell, circuit judge of the United States circuit court of appeals for the eighth circuit, this 20th day of February, in the year of our Lord one thousand eight hundred and ninety-six.

HENRY C. CALDWELL,
Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

I hereby accept service of the above and foregoing citation this 27th day of February, 1896.

KENT K. HAYDEN,
Receiver of the Capital National Bank of Lincoln,
By COBB & HARVEY,
Attorneys for Complainant.
AUGUST T. GRUETTER,
CHARLES F. JOERS,
By JOHN H. AMES, *Their Att'y.*

[Endorsed:] C. No. —. Ambrose P. S. Stuart, appellant, *vs.* Kent K. Hayden, receiver, *et al.* Citation. Filed Mar. 4, 1896. John D. Jordan, clerk.

283 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing 282 pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of Ambrose P. S. Stuart, appellant, *vs.* Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, *et al.*, appellees, No. 666, December term, 1895, as the same remain upon the files and records of said United States circuit court of appeals.

I further certify that the original citation, with the acceptance of service thereon, is hereto attached and herewith returned.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this ninth day of March, A. D. 1896.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

284 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at a term thereof begun and held at the United States court-house, in the city of St. Louis, Missouri, on the first Monday in December, it being the second day of December, A. D. 1895, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that on the twentieth day of February, A. D. 1896, an appeal to the Supreme Court of the United States was prayed by and allowed to Ambrose P. S. Stuart from a decree entered in said United States circuit court of appeals on the 30th day of December, A. D. 1895, in a certain cause wherein Ambrose P. S. Stuart was appellant and Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, *et al.* were appellees, No. 666, December term, 1895, which said appeal is now pending in said Supreme Court of the United States.

And on the twenty-seventh day of March, A. D. 1896, the appellant August T. Gruetter, Charles F. Joers, and Gruetter and Joers prayed and were allowed an appeal to the Supreme Court of the United States from the said decree entered on the 30th day of December, 1895, in said cause, the petition for appeal, assignment of errors, and order allowing said appeal being in the words and figures following, to wit:

285 In the Circuit Court of Appeals for the Eighth Judicial Circuit of United States, May Term, 1895.

AMBROSE P. S. STUART, Appellant,
vs.
KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska, and August T. Gruetter and Charles F. Joers, Appellees. } No. 666.

Petition for Appeal and Assignment of Errors for Appellees August T. Gruetter and Charles F. Joers.

The appellees August T. Gruetter and Charles F. Joers, defendants to the original bill of complaint and complainants in the cross-

bill in the circuit court, feeling themselves aggrieved by the order and judgment heretofore entered by this court in this cause, do hereby appeal from said order and judgment to the Supreme Court of the United States and pray that their said appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said judgment was made and entered, duly authenticated, may be sent to said Supreme Court.

And as reasons for and for the purposes of said appeal the said August T. Gruetter and Charles F. Joers now here, by their counsel, John H. Ames, make and assign the following assignments of errors prejudicial to them, which they allege to have intervened in and to be disclosed by said record, proceedings, and judgment:

First. The court erred in holding that the cross-bill of these defendants August T. Gruetter and Charles F. Joers does not state facts sufficient to confer upon the circuit court of the United States for the district of Nebraska jurisdiction in equity to grant the relief prayed for in said cross-bill.

Second. This court erred in holding that the evidence and testimony disclosed by the records in this cause do not disclose
286 facts sufficient to entitle these defendants August T. Gruetter and Charles F. Joers to the relief prayed for in their said cross-bill.

Third. This court erred in holding that the defendants August T. Gruetter and Charles F. Joers were or would not have been entitled to the relief for which they prayed in their cross-bill, except upon condition that they should rescind or offer to rescind the sale of their real estate to the appellant Stuart and restore or offer to restore to said Stuart the sum of nineteen thousand five hundred ($19,500) — and interest thereon paid them by said Stuart as part consideration of said sale.

Fourth. This court erred in holding that by delay or by beginning of an action in the State court or otherwise the defendants August T. Gruetter and Charles F. Joers had waived or abandoned the remedy sought or the relief prayed for in their said cross-bill or had made an election of remedies inconsistent with a demand for such relief in this suit.

Fifth. This court erred in entering a judgment directing the dismissal of the cross-bill of these defendant- August T. Gruetter and Charles F. Joers.

Sixth. This court erred in entering a judgment vacating or directing the vacation of the decree of the circuit court of the United States for the district of Nebraska in so far as said decree adjudged that the appellant Stuart should make restitution to said defendants in the sum of twenty thousand nine hundred five ($20,905.00) dollars.

Seventh. The court erred in entering a judgment vacating or directing the vacation of the decree of the circuit court of the United States for the district of Nebraska in so far as said decree adjudged that the sale, transfer, and assignment of the shares of the capital stock of the Capital National bank from the appellant Stuart to these defendants August T. Gruetter and Charles F. Joers was and

is void as against said Gruetter & Joers, and that the same be cancelled, set aside, and held for naught, and that said shares of stock be reinstated upon the books of the bank in the name of said appellant Stuart.

287 Wherefore these defendants August T. Gruetter and Charles F. Joers pray that the said appeal may be allowed, and that the said judgment and decree of this court may be in the respects aforesaid modified and reformed or be reversed, vacated, and set aside, and that the decree of the circuit court of the United States for the district of Nebraska may be in all things reinstated, affirmed, and enforced.

JOHN H. AMES,
Solicitors for Appellees, Respondents, and Cross-complainants August T. Gruetter and Charles F. Joers.

UNITED STATES OF AMERICA, *Eighth Circuit,* } *ss:*

On consideration of the foregoing petition it is now here ordered that an appeal to the Supreme Court of the United States be, and the same is hereby, allowed to the said Augustus T. Gruetter and Charles F. Joers, as prayed in said petition, and that the appeal bond herein be, and is hereby, fixed at the sum of five hundred dollars.

Dated March 27, 1896.

(Signed) AMOS M. THAYER,
Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed: In the circuit court of the United States. No. 666. Ambrose P. S. Stuart, appellant, *vs.* Kent K. Hayden, receiver, *et al.*, appellees. Petition for appeal and assignment of errors for appellees Gruetter & Joers and order allowing appeal. Filed Mar. 27, 1896. John D. Jordan, clerk. John H. Ames, solicitor for appellees August T. Gruetter and Charles F. Joers.

288 And on the twenty-seventh day of March, A. D. 1896, an appeal bond of the said Gruetter *et al.* was filed in the office of the clerk of said circuit court of appeals in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

AUGUST T. GRUETTER and CHARLES F. JOERS, Appellant-, } *vs.* AMBROSE P. S. STUART and KENT K. HAYDEN, Appellees. }

Know all men by these presents that we, August T. Gruetter and Charles F. Joers, as principals, and N. S. Harwood, as surety, all of the city of Lincoln, in the State of Nebraska, are held and firmly bound unto the above-named Ambrose P. S. Stuart and Kent K. Hayden in the sum of five hundred ($500) dollars, to be paid to the

said Ambrose P. S. Stuart and Kent K. Hayden; for the payment of which, well and truly to be made, we bind ourselves and each of us, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of the foregoing obligation is such that whereas the above-named August T. Gruetter and Charles F. Joers have prosecuted an appeal to the Supreme Court of the United States to reverse a certain decree rendered in said United States circuit court of appeals for the eighth judicial circuit in a certain cause in which the said Ambrose P. S. Stuart was appellant and the said Kent K. Hayden and the above-named August T. Gruetter and Charles F. Joers were appellees in said last-named court:

Now, therefore, if the said August T. Gruetter and Charles F. Joers shall prosecute said appeal to effect and shall answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

289 Witness our hands, at Lincoln, Nebraska, on this 25th day of March, 1896.

AUGUST T. GRUETTER AND
CHARLES F. JOERS,
By JOHN H. AMES, *Their Attorney.*
N. S. HARWOOD.

Approved March 27, 1896.

(Signed) A. M. THAYER,
Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed: No. 666. Ambrose P. S. Stuart, appellant, *vs.* Kent K. Hayden, receiver *et al.* Appeal bond on appeal of Augustus T. Gruetter and Charles F. Joers. Filed Mar. 27, 1896. John D. Jordan, clerk.

And on the seventh day of April, A. D. 1896, a citation was filed in said cause, the original of which is hereto attached and herewith returned, in the following words, to wit:

290 THE UNITED STATES OF AMERICA:

To Ambrose P. S. Stuart and Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the U. S. circuit court of appeals for the eighth circuit, wherein August T. Gruetter and Charles F. Joers are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should

not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Amos M. Thayer, judge of the United States circuit court of appeals for the eighth circuit, this twenty-seventh day of March, in the year of our Lord one thousand eight hundred and ninety-six.

AMOS M. THAYER,
Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

291 [Endorsed:] No. —. Supreme Court of the United States. August T. Gruetter and Charles F. Joers, appellants, *vs.* Ambrose P. S. Stuart *et al.* Citation on appeal. Filed Apr. 7, 1896. John D. Jordan, clerk.

LINCOLN, NEBRASKA, *March 4th*, 1896.

The subscribers acknowledge service of the within citation and enter their appearance to the within-named appeal in the Supreme Court of the United States.

KENT K. HAYDEN, *Receiver*,
By G. M. LAMBERTSON,
His Attorney.
C. C. FLANSBURG,
Counsel for Ambrose P. S. Stuart.

292 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing pages, numbered from one to seven, inclusive, contain full, true, and complete copies of the petition for appeal, assignment of errors, ordered allowing appeal, and appeal bond on the cross-appeal of August T. Gruetter, Charles F. Joers, and Gruetter and Joers in a certain cause between Ambrose P. S. Stuart, appellant, and Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, *et al.*, appellees, No. 666, December term, A. D. 1895, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I further certify that the original citation, with the acknowledgment of service endorsed thereon, is hereto attached and herewith returned.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this seventh day of April, A. D. 1896.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

293 In the Supreme Court of the United States.

AMBROSE P. S. STUART, Appellant,
v.
KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska; Augustus T. Gruetter, and Charles F. Joers, Appellees.

Assignments of Error.

The appellant herein, by C. C. Flansburg, his counsel, says that the decree, finding, opinion, and judgment in the above-entitled cause, rendered by the circuit court of appeals of the United States within and for the eighth judicial circuit, is erroneous and against the just rights of appellant Stuart for the following reasons:

First. The court erred in holding the said appellant, Stuart, liable simply because he was a director and ought to have known, when in fact he had no actual notice of the condition of said bank.

Second. The court erred in rendering judgment for the receiver and holding the appellant Stuart liable on said assessment levied by the comptroller.

Third. The court erred in holding that said transfer was fraudulent and made on behalf of said Stuart with the intent and for the purpose of escaping his statutory liability.

Fourth. The court erred in holding that the said transfer was voidable as to the bank after it had found that the transferees were solvent at the time of the transfer.

Fifth. The court erred in reversing the case and ordering a decree to be entered against Ambrose P. S. Stuart, thus and
294 thereby making a new contract for the parties.

Sixth. The court erred in holding that said transfer was voidable as to the bank after it had expressly found that the transfer was valid as to the transferees, and that they had by affirmative action confirmed the validity of said transfer.

Seventh. The court erred in not directing the receiver to collect from Gruetter & Joers, the transferees, the amount of the assessment, it appearing that they were at the time of the bringing of the suit possessed of large amounts of personal property, more than sufficient to pay the assessment levied by the comptroller, and it also appearing that Gruetter & Joers, the transferees, with full knowledge of all the facts, had confirmed the validity of the transfer.

Eighth. The court erred in not awarding to the appellant Stuart his costs in reversing the decree of the court below, the circuit court having held that the transfer was void as to the bank, having ordered a transfer of the shares of the stock to be entered upon the books of the bank in the name of Ambrose P. S. Stuart, when in fact, at the most, said transfer was only voidable, and the court had no jurisdiction to award the entering of said transfer upon the books of the bank, and this decree being erroneous and so found by the circuit court upon a reversal thereof, appellant should recover his costs.

Wherefore the said appellant prays that the said decree be reversed; that the said court may be directed to enter a decree reliev-

ing said appellant from all liability by reason of the transfer of said stock and awarding him his costs.

C. C. FLANSBURG,
Counsel for Appellant.

295 [Endorsed:] Case No. 16,243. Supreme Court U. S., October term, 1896. Term No., 481. Ambrose P. S. Stuart, app't, *vs.* Kent K. Hayden, rec'r, *et al.* Assignment of errors. Filed July 1, 1896.

Endorsed on cover: Case No. 16,243. U. S. circuit court of appeals, eighth circuit. Term No., 151. Ambrose P. S. Stuart, appellant, *vs.* Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska; Augustus T. Gruetter, and Charles F. Joers. Filed March 30, 1896. Case No. 16,265. Term No., 160. August T. Gruetter and Charles F. Joers, appellants, *vs.* Ambrose P. S. Stuart and Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska. Filed April 27, 1896.

IN THE

Supreme Court of the United States.

AMBROSE P. S. STUART,
Appellant,
vs.
KENT K. HAYDEN, Receiver of the Capital National Bank,
Appellee.

} Objections to Motion to Advance.

C. C. Flansburg, *Counsel for Appellant.*

The appellant, by C. C. Flansburg, his counsel, objects to the above entitled cause being advanced on the docket for hearing during the present term, for the reason and because the facts alleged in the affidavit accompanying said motion to advance are insufficient, and because the said affidavit is untrue.

Further, because said case is not a revenue or other case in which the United States is concerned, or one which involves or affects some matter of general public interest, all of which will more fully appear from the affidavit filed herewith.

C. C. FLANSBURG,
Counsel for Appellant.

IN THE

Supreme Court of the United States.

AMBROSE P. S. STUART,
Appellant,
vs.
KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK,
Appellee.

STATE OF NEBRASKA, } ss.
LANCASTER COUNTY. }

Ambrose P. S. Stuart, being first duly sworn, deposes and says that he is the appellant in the above entitled cause; that the decree rendered in favor of the appellee, Kent K. Hayden, in the circuit court of the United States, was set aside by the circuit court of appeals for the eighth circuit, and a new decree, nearly $2,000 less in amount entered.

Affiant denies that this cause is the cause of any delay in the winding up of the affairs of the said bank, but alleges the fact to be that there is now pending in the United States circuit court, within and for the district of Nebraska, a suit by Kent K. Hayden, the appellee herein, as receiver of the Capital National Bank, against the appellant herein, and others, former stockholders of the said Capital National Bank, to recover from the said stockholders all dividends paid to them during the existence of said bank; and the

amount demanded by the prayer of said bill, and for which it is alleged the defendants are liable, is in excess of the sum of two hundred thousand dollars ($200,000): that by consent and agreement of counsel for complainant and respondents, the time for taking testimony in said cause has been extended to the 1st day of March, 1897, and said cause cannot be heard before the May, 1897, term of said circuit court, so that in no event could the trust be wound up, as alleged in the motion to advance said cause, if the cause herein pending is speedily heard.

AMBROSE P. S. STUART.

Subscribed in my presence, and sworn to before me this 30th January, A.D., 1897.

R. O. WILLIAMS,
Notary Public.

No. 151 & 160.

NOV 8 18
JAMES H. McKENN

Brief of Appellees for Appts. in 160

SUPREME COURT

OF THE

UNITED STATES.

Filed Nov. 8, 1897.

No. 151.

AMBROSE P. S. STUART,

Appellant,

vs.

ENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA; AUGUST T. GRUETTER AND CHARLES F. JOERS.

FILED MARCH 30, 1896.

No. 160.

AUGUST T. GRUETTER AND CHARLES F. JOERS,

Appellants,

vs.

AMBROSE P. S. STUART AND KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK, OF LINCOLN, NEBRASKA.

FILED APRIL 27, 1896.

BRIEF OF APPELLANTS, AUGUST T. GRUETTER AND CHARLES F. JOERS.

JOHN H. AMES,
Solicitor for Appellants, Gruetter & Joers.

JACOB NORTH & CO., PRINTERS AND STATIONERS, LINCOLN, NEB.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 151.

AMBROSE P. S. STUART,
Appellant,
vs.
KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA; AUGUST T. GRUETTER AND CHARLES F. JOERS.

FILED MARCH 30, 1896.

No. 160.

AUGUST T. GRUETTER AND CHARLES F. JOERS,
Appellants,
vs.
AMBROSE P. S. STUART AND KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA.

FILED APRIL 27, 1896.

JOHN H. AMES, *Solicitor for Appellants, Gruetter & Joers.*

BRIEF OF APPELLANTS, AUGUST T. GRUETTER AND CHARLES F. JOERS.

STATEMENT OF FACTS.

Concerning the facts disclosed by the record in this case there is and can be little or no disagreement.

On the 17th day of December, 1892, the appellees and cross complainants, Gruetter & Joers, were the owners of certain real property in the city of Lincoln, Nebraska, of the fair value of $67,500 (see testimony of Stuart, record, pages 29 and 30).

It is alleged both in the cross bill of Gruetter and Joers (record, page 19, and in the answer of Stuart thereto, record, page 214) that on that day Gruetter & Joers sold and conveyed this property to Stuart for the agreed purchase price of $67,500, receiving in part payment therefore 150 shares of the capital stock of the Capital National Bank, of Lincoln, Nebraska; to quote the language of said answer, "at and as of the value of $18,000." Especial attention is invited to the language of these pleadings, because it is expressly alleged in both of them that there was a sale of the property for a cash consideration, and that the shares of stock were accepted in lieu of cash at an agreed valuation.

There is no pretense in the pleadings or testimony that there was a trade or barter of the property for the shares, or *vice versa*.

It is not disputed that for a period of about ten years

next previous to this transaction Stuart had been, and was then, a member of the board of directors and of the finance committee of said bank, upon the books of which these shares all that time stood in his name, nor that these facts were known to Gruetter & Joers and were an especial inducement to them to rely upon his statements and representations as to the value of the shares and condition of the bank, upon the supposition that he had superior opportunities for intimate and accurate knowledge of these matters and interested motives for availing himself of them. Stuart himself says (record, pages 30 and 31) that, as a matter of fact, he was customarily in the bank almost every day, and that, as a member of the committee, he "examined the paper" once in three months.

It is not denied that on the day on which the sale was made a copy of a statement of the condition of the bank at the close of business on December 9, which showed the shares to be worth 10 per cent premium, was published in one of the Lincoln papers over the signatures of the officers of the bank, nor that this statement was discussed by the cross complainants and Stuart, and was a considerable inducement to the former to accept the shares, nor that similar statements making a like favorable showing and purporting to give the condition of the bank on the 25th day of September, 1891, the 1st day of March, 1892, the 2d day of December, 1891, the 17th day of September, 1892, and subscribed by Stuart as director, had been published in the same paper and had come to the knowledge of the cross complainants and influenced their judgment in appraising the stock and deciding to accept it. Stuart (record, pages

32 and 33) concurs with cross complainants (record, pages 144–156) that, as an inducement to the latter to accept the shares at the price named, he told them that the bank stock was "all right," and that the bank was in a safe and sound condition, that the bank examiner had then recently thrown out *all* the bad paper, amounting to $30,000, and that he had shortly before been offered $125 per share for his stock, but had refused to sell because he did not know another so safe and profitable an investment, or words to that effect, and that "if he could make a turn or two shortly he would be glad to take the stock back at the very price he was being paid for it, because it paid him from 12 to 20 per cent per annum." Before concluding the sale, Gruetter applied to Outcalt, the cashier of the bank, to know the value of the shares, informing him that the inquiry was made with a view to purchasing, and was told by him, in effect, that they were worth from 30 to 40 per cent premium. Such were the representations. The facts were that the bank then was, and for many years prior thereto had been, hopelessly insolvent.

These facts are clearly established by the uncontradicted testimony of receiver Hayden, pages 94–135 of the record, which it could serve no useful purpose to reprint here. Of its bills receivable less than $60,000 in amount were good; less than $142,000 in amount could be graded so high as "doubtful"; and more than $550,000 were absolutely worthless at the date of suspension—thirty days after the date of the above mentioned sale. At the date of suspension also the total liabilities of the bank were $1,463,013.17. The remaining assets of the bank consisted of vacant and

unimproved lands of no estimated practical value, and of $15,385.87 cash on hand.

How much Stuart knew about this state of affairs is to be inferred from his relations to the bank and his guarded admissions as a witness. He says (record, page 36) that he had been for a long time dissatisfied with the management of the bank by its president and cashier, Mosher and Outcalt, and that he said as much to the witness, Gerner, while discussing the advisability of the purchase from cross complainants (see also testimony of witness Gerner on page 140 of record).

He knew that there was a loss by Donald, Losson, and Simpson (record, page 54). The actual amount of that loss was $40,800 (record, page 107). He knew of the loss of $14,000 by the Sherman County Banking Company (record, page 54). He knew (record, page 50) that $40,000 to $50,000 had been tied up in land in what is called the Small transaction. He knew (record, page 53) that a large sum, as a matter of fact nearly $50,000, was tied up in York county land through a deal with E. W. Mosher, a brother of the president. He knew (record, page 53) that some $45,000 or $50,000 had been loaned to E. W. Mosher, who was worthless. He knew (record, pages 48, 49) that the bank was carrying some, but claims not to have known how much, of the spurious Western Manufacturing Company paper. In fact, at the date of suspension, the bank had on hand of this paper $125,000 in amount, and it was liable upon rediscounts of the same for $110,000 more (see record, page 103). He knew (record, page 53) that money of the bank was being sent to E. W. Mosher, at York, to

be loaned upon real estate mortgages. He knew (record, page 63) that both the president and cashier were loose in their private conduct and morals, and he had repeatedly but ineffectually protested to both the president and cashier concerning their conduct and their being engaged in too many enterprises, not all of them of the most reputable kind (see record, pages 36, 141, 136).

He knew or had heard (record, page 49) that the bank was carrying some $30,000 in amount of worthless so-called Marsh paper, which had been put in by Mosher in payment of his stock subscription. Much more to like effect might be quoted from the record, but enough has been said already to prove that he must have known, and did know at the time he made this purchase, that the bank was hollow to the core, and that its certificates were valuable only as obligations in favor of its creditors.

The sale was completed on the 17th day of December. A transfer of the certificates upon the books of the bank was effected January 3. On the 22 of the latter month, Sunday, the fact became public that on the preceding day the institution had been closed by the bank examiner, and was probably insolvent, though it was not then, nor for some weeks thereafter, supposed by cross complainants nor by the public that a stock assessment would be required to meet its obligations.

On the 11th day of August, 1893, the complainant filed in the Circuit Court of the United States for the district of Nebraska his bill against Ambrose P. S. Stuart, sole defendant (record, page 1.) This document, after reciting the

incorporation and insolvency of the Capital National Bank, the appointment of the receiver, and the ascertainment by the comptroller of the currency that it was necessary to make a one hundred per cent assessment upon the stock of the bank, and the execution and issuance of his order or proclamation to that effect, charges that on or about the third day of January, 1893, Stuart sold and caused to be transferred on the books of the said bank by proceedings regular in form, but colorable only and not made in good faith, his one hundred and fifty (150) shares of stock to Gruetter & Joers; who, the bill alleges, upon information and belief, are and were at the last date aforesaid pecuniarily irresponsible persons from whom the assessment could not be made, and prays that the sale and transfer may be adjudged to be sham and pretended and Stuart held responsible for the assessment as though the same had not been made. To this bill the defendant Stuart filed a demurrer (record, page 6) the second clause of which is as follows: "And for further cause of demurrer, this defendant shows that it appears by said plaintiff's said bill that Gruetter and Joers (the parties therein named as the alleged fraudulent transferees of said shares of bank stock) are residents within the jurisdiction of this Court and are necessary parties to said bill, and the said Gruetter and Joers are not named as parties thereto." Afterward and on the 9th day of January, 1894, the complainant submitted to the said demurrer and obtained leave (record, page 7) to file an amended bill of complaint making Gruetter & Joers defendants thereto, and the same day filed an amended bill (record, page 8) which did not differ materially from the original bill, except that Gruetter & Joers were made parties thereto and required by sub-

pœna to appear and make answer. On the 24th day of February, 1894, in obedience to this subpœna, Gruetter & Joers did appear (record, page 11) and filed their answer to the said amended bill. This answer denies all manner of collusion and combination between them and said Stuart, and avers that they became the transferees of the stock in good faith and for value and without any intent on their part to defeat the bank or its creditors or prevent the collection of the assessment, and without any knowledge or suspicion on their part that the bank was or was likely to become insolvent, or that its capital had been impaired, but that they had been induced by Stuart, through certain fraudulent representations and wrongs, to purchase said stock at the sum of eighteen thousand ($18,000) dollars, which was at a premium over the par value of the shares of twenty per cent, and that while it was the object and intent of the said Stuart to escape liability as a share holder in the bank, which he knew, or had reasons to believe, was, or was likely to become, insolvent, his purpose was to effect such escape by shifting the liability upon these defendants. On the 20th day of March, 1894, the defendants, Gruetter & Joers, obtained leave to file and did file their cross bill, (record, page 19) setting forth substantially, but at greater length and with more particularity, the facts contained in their answer to the amended bill, and prayed subpœna against the complainant and defendant, Stuart, and that the transfer of the stock might be decreed to be fraudulent and void against them, and the same set aside, and the said Stuart reinstated upon the books of the bank as a stock holder therein; and that he be adjudged to pay the amount of the assessment, and that the complainant, Hayden, the re-

ceiver, be required to exhaust his remedies against said Stuart before resorting to cross complainants, and that Stuart be adjudged to maker estitution to the cross complainant of the eighteen thousand ($18,000) dollars, purchase price of the stock, together with interest thereon.

Cross bill also sets out more fully than the answer of the same parties the fact that they acquired the stock from Stuart in part payment of purchase price of certain real estate which they sold and conveyed to said Stuart on the 23d day of December, 1892. Stuart answered both amended bill and cross bill, putting in issue all the material allegations of both documents. Replications were filed and proofs were taken, and the case went to hearing and decree in the said court on the 23d day of April, 1895. This decree was passed both upon the amended bill and the cross bill, but was in all respects as prayed by the cross-bill (see record, page 219). From this decree Stuart prosecuted an appeal in the United States Court of Appeals for the eighth circuit, and by it an order was entered reversing the decree, and remanding the case to the Circuit Court, with directions to enter a decree to the effect that the transfer of one hundred and fifty shares of stock from Stuart to Gruetter & Joers was fraudulent and voidable as to the receiver Hayden; that it be held for naught as to him, and that he recover of Stuart the assessment levied thereon with his costs; that the appellees, Gruetter & Joers, are entitled to no relief against Stuart in this suit, but that their supposed cross bill be dismissed, and that Stuart recover from them his costs thereon (record, page 237). From this decree of the Circuit Court of Appeals,

Stuart and defendants, Gruetter & Joers, prosecute separate appeals to this court.

The assignment of errors by the appellants, Gruetter & Joers (record, page 245), is as follows:

"And as reasons for and for the purposes of said appeal the said August T. Gruetter and Charles F. Joers now here, by their counsel, John H. Ames, make and assign the following assignments of error prejudicial to them, which they allege to have intervened in and to be disclosed by said record, proceedings, and judgment.

First—The court erred in holding that the cross bill of these defendants, August T. Gruetter and Charles F. Joers, does not state the facts sufficient to confer upon the Circuit Court of the United States for the district of Nebraska jurisdiction in equity to grant the relief prayed for in said cross bill.

Second—This court erred in holding that the evidence and testimony disclosed by the records in this cause do not disclose facts sufficient to entitle these defendants, August T. Gruetter and Charles F. Joers, to the relief prayed for in their said cross bill.

Third—This court erred in holding that the defendants, August T. Gruetter and Charles F. Joers, were or would not have been entitled to the relief for which they prayed in their cross bill, except upon condition that they should rescind or offer to rescind the sale of their real estate to the appellant Stuart, and restore or offer to restore to said Stuart the sum of nineteen thousand five hundred ($19,-

500) and interest thereon paid them by said Stuart as part consideration of said sale.

Fourth—This court erred in holding that by delay or by beginning of an action in the State Court or otherwise the defendants, August T. Gruetter and Charles F. Joers, had waived or abandoned the remedy sought, or the relief prayed for in their cross bill, or had made an election of remedies inconsistent with a demand for such relief in this suit.

Fifth—This court erred in entering a judgment directing the dismissal of the cross bill of these defendants, August T. Gruetter and Charles F. Joers.

Sixth—This court erred in entering a judgment vacating or directing the vacation of the decree of the Circuit Court of the United States for the district of Nebraska, in so far as said decree adjudged that the appellant Stuart should make restitution to said defendants in the sum of twenty thousand nine hundred and five ($20,905) dollars.

Seventh—The court erred in entering judgment vacating or directing the vacation of the decree of the Circuit Court of the United States for the district of Nebraska, in so far as said decree adjudged that the sale, transfer, and assignment of the shares of the capital stock of the Capital National Bank from the appellant Stuart to these defendants, August T. Gruetter and Charles F. Joers, was and is void as against said Gruetter & Joers, and that the same be canceled, set aside, and held for naught, and that said shares of stock be reinstated upon the books of the bank in the name of said appellant Stuart.

Wherefore these defendants, August T. Gruetter and Charles F. Joers, pray that the said appeal may be allowed, and that the said judgment and decree of this court may be in the respects aforesaid modified and reformed or be reversed, vacated, and set aside, and that the decree of the Circuit Court of the United States for the district of Nebraska may be in all things reinstated, affirmed, and enforced."

BRIEF.

I.

These facts made it apparent to Gruetter & Joers that $18,000 in amount of the consideration price, for which they had sold and conveyed their property to Stuart, had wholly failed, and on the following day, January 23, they brought suit for its recovery in the State Court. That suit is now pending. That suit, so far from being, as counsel for appellant contends, an affirmance of the transfer of the stock, is a distinct and expressed repudiation of it, and so far from being an action for the recovery of damages and for fraud or breach of warranty in the sale of the shares as to be an action to recover the unpaid residue of the purchase price of their property, the title of which Stuart had fraudulently obtained without consideration, to the extent of $18,000. Had it not been for the fact developed later, that shareholders are liable to an assessment by the comptroller of the currency, that action would have afforded cross complainants a complete remedy, and their recovery upon the above facts cannot be doubted. But the fact of the assessment put an entirely different face upon the matter. It would be a very slight advantage to Gruetter & Joers to re-

cover the $18,000 residue of purchase money if they should be compelled to pay the receiver $15,000 and interest as an assessment upon the shares of stock. They can be relieved of this latter liability only by a Court of Equity having the power to set aside the assignment and transfer of the stock as having been procured by the fraud both of Stuart and of the bank through its officers and agents. It would be a violation of every precedent and principle of equity to require that they should first pay this assessment and then be remitted to their action against Stuart, who is shown by the record to have conveyed away all his property, in order to obtain reimbursement.

They have done no wrong. They have not been guilty of even a slight degree of negligence. On the contrary, they are shown to have adopted every precaution, in this transaction, which could have been reasonably expected from the most experienced, careful, and prudent business men. But whether such an action may be maintained at all and if a right to maintain it exists under any circumstances, whether it exists under the circumstances of this case, whether persons who have been tricked and defrauded, in the manner in which cross complainants have been tricked and defrauded, into the assumption of the nominal attitude of shareholders, are in fact shareholders within the meaning of section 5151, of the Revised Statutes, whether the pretended transfer ought not to be set aside and Stuart reinstated as the shareholder of the bank, and the receiver restricted to his remedy against him for the recovery of the assessment, or whether the receiver ought not to be required, first, to exhaust the property of Stuart before re-

sorting to that of Gruetter & Joers, whether, at the worst, Gruetter & Joers are not to be regarded, in equity, as being in the attitude of sureties for Stuart's liability upon the assessment, and, if compelled to pay it, entitled to be subrogated to the rights and remedies of the receiver against him for reimbursement, are all Federal questions involving the construction of the laws of congress, with which the Federal Court, regardless of the citizenship of the parties, is alone competent to deal. Certainly the State Court cannot restrain the receiver from proceeding with what he regards as the performance of his duty under the authority of the United States, and certainly, unless it can do so, its decree setting aside the transfer and reinstating Stuart as shareholder, and adjudging him to be solely liable for the assessment, would be wholly nugatory. It is equally certain that a court which has sole jurisdiction of a controversy between parties has the right, and is charged with the duty, to finally adjust and determine all the rights and obligations involved in the suit, and not only setting aside conveyances and decreeing titles, but, when necessary, awarding compensation.

All these propositions seem to be as well settled as anything can be settled by principle and judicial authority, and if such is the case the decree of the Court below is in all things right and ought to be affirmed.

II.

It is contended by counsel for appellant that the Circuit Court had no jurisdiction, first, because of the citizenship of the parties, and, second, that the matter sought to be liti-

gated is not of equitable cognizance. It is alleged in the cross bill and proved in the record that Gruetter & Joers were induced to make the purchase by fraudulent representations and warranties by Stuart, and by false, fraudulent, and misleading statements and representations made by the bank and its officials, upon which they relied.

As to the second of these contentions, it is, I think, established beyond controversy that the matter is of equitable cognizance. "Equity" says the Supreme Court in Jones vs. Bowles, 9 Wallace, U. S., 364, "has always jurisdiction of fraud, misrepresentations, and concealment, and this does not depend upon discovery." That was an action by stockholders to enjoin the collection from, or payment by, a corporation of the purchase price of a tract of land, the complainants having purchased their stock from the defendant Jones, who was seeking the recovery of the purchase price upon his representation that the company owned the land. The situation in many of its essential features was very like that of the parties in the case at bar. The courts say, speaking by Mr. Justice Bradley: "It is objected that a Court of Equity has no jurisdiction of the case because the law affords a complete remedy in damages; this objection is groundless. Equity has always had jurisdiction of fraud, misrepresentation, and concealment, and it does not depend upon discovery; but in this case a Court of Law could not give adequate relief. The agreement complained of is perpetual in its nature, and the only effective relief against it, where the keeping of it on foot is a fraud against parties, is the annulment of it. This cannot be decreed by a Court of Law, but can by a Court of Equity."

The Court also held that the corporation was a proper party, although no relief was sought against it. In this case relief is sought against the bank and receiver by being relieved from obligation for the assessment.

The Florida Land and Improvement Company vs. Mer rill, 52 Federal Reporter, 77, decided by the Circuit Court of Appeals for the fifth circuit, is very similar to the case at bar. Complainant had sold to one Winegar, president of the First National Bank of Palatka, Florida, a large tract of land, receiving in part payment therefor 100 shares of the capital stock of the bank at $115 per share. The purchase of the stock was induced by representations made by Winegar very similar to those made by Stuart in this case. Six months after the trade, instead of within thirty days as in the case at bar, the Palatka bank failed, and the defendant Merrill was appointed receiver. The bill was filed to rescind the purchase and relieve the complainant from liability to an assessment as shareholder, and to recover the purchase price. Upon demurrer it was held that the complainant was entitled to the relief prayed. The only respects in which the above case differs from this are, first, that the stock sold by Winegar really belonged to the bank, and, second, the citizenship of the parties was different. I do not think that either difference is important. In both cases the vendor of the stock was a prominent officer of the bank, having familiarity with its condition, and affairs, and in both cases the frauds and misrepresentations were known to the bank, which, with its creditors and depositors sought to profit thereby. The claim that the creditors of the bank could not be deprived of the purchase price of the stock, or

of the right to resort to the personal liability of the transferee as shareholder, was strenuously urged by counsel and distinctly repudiated by Judge Pardee, who wrote the opinion of the Court of Appeals. It is true that especial stress is put by the Court upon the fact that the bank was the real owner and vendor of the shares. In view, however, of the fact that the National Banking Act forbids a bank to be the owner of its own stock, and that the liability, if any, of the transferee to assessment is the same in both instances, I do not see how this fact alone affects the right of the transferee to be relieved from liability. The liability of the shareholder is a trust fund and an asset in the hands of the receiver of exactly the same nature and character as any other property or choses in action belonging to it. In both cases the liability as against the complainant was procured by the bank through the frauds and misrepresentations of its officers and agents. It would be as unjust to permit it or its creditors to profit thereby in the one case as in the other, and for precisely the same reasons. A case very similar to the foregoing, and to the same effect, is Upton vs. Englehart, 3 Dillon, 496.

Bowden vs. Johnson, 107 U. S., 251, holds that the transfer by a shareholder of his shares to an irresponsible transferee upon the eve of insolvency, for the purpose of escaping liability to an assessment, may be set aside in equity at the suit of the receiver and the liability of the original shareholder restored and enforced. If one party affected by the transaction may have this remedy, why may not the other? Both the original bill and the cross bill in the case at bar allege that Stuart made this transfer for the purpose, among

other things, of escaping this obligation. Why will not equity in this case, as in others of similar nature, avoid circuity of action and protect the assignee by rescinding the transaction and compelling a resort, in the first instance, to the fraudulent assignor? And are there not especial reasons for doing so when the bank was party to the fraud? The general doctrine that equity will entertain a bill by the purchaser to rescind a sale of corporate shares which was induced by the fraud of the vendor, and that the corporation is a proper and necessary party to said action, is well exemplified by the case of Booth vs. Smith, 117 Illinois, 370, and by Peek vs. Gurney, 13 L. R. Equity Cases, 79. To the same effect Pomeroy Equity Jurisprudence, paragraph 881, and note; Hill vs. Lane, 11 R. L. Equity Cases, 215; Martin vs. Hill, 43 N. W. (Minn)., 337. But I forbear from further citations. While I have found many authorities in support of this doctrine, I have found none to the contrary, and believe it to be as familiarly established as any principle in our jurisprudence.

III.

If, then, equity has jurisdiction of a bill to obtain a rescission, and the corporation or its representative, the receiver, is a necessary party thereto, of which I have no doubt, it can as little be questioned that the Circuit Court had jurisdiction of the matters alleged in the cross bill and would have like jurisdiction of an original bill having the same object, notwithstanding the parties thereto are all citizens of the same state.

In the first place the cross bill, as is abundantly shown

by the Florida Land & Improvement Company vs. Merrill, 52 Federal Reporter, 77, cited above, calls for the construction of the laws of the United States, viz., for the determination of force and effect of the provision of the National Banking Act with respect to the assessment of shareholders of insolvent associations, and as to who are shareholders within its meaning. This is so obvious, it seems to me, as to preclude the necessity, if not the possibility, of argument in its support.

But there is another reason for holding that this court has jurisdiction of the matters alleged in the cross bill, which is, that the cross complainants seek thereby to affect and control the conduct of the receiver of the Capital National Bank, and to limit and restrain his remedies with respect to enforcing the liability of the shareholders of the bank. The case therefore falls within the principle in Grant vs. The Spokane National Bank, 47 Federal Reporter, 673, which was a suit by a citizen of the state of Washington, in which the bank was situated, brought for the purpose of controlling the official conduct of the receiver of the bank, in so far as to secure a particular application of a portion of the funds in his official custody in satisfaction of a claim of the plaintiff against the insolvent bank, for money received by it as collecting agent, and which was held for that reason alone to be a suit arising under the laws of the United States. And in Sowles vs. The First National Bank of St. Albans, 46 Federal Reporter, 513, it was held "a suit against a national bank, to reach property held as a part of its assets by its receiver, appointed by the comptroller of the currency, arises under the laws of the United States,

and may be removed from the State Court into the Federal Court," without reference to the citizenship of the parties. There is, perhaps, no occasion for discussing the extent of the remedy which this Court ought to afford to the cross complainants. Your honors are familiar with the general proposition laid down in a great many decisions by the Circuit and Supreme Courts of the United States, that an original bill and a cross bill thereto constitute but one cause, and that when a Circuit Court has jurisdiction of the former for any reason it has jurisdiction of the latter without reference to citizenship. Thus it is held, to cite one case out of a great many, in the First National Bank of Salem vs. The Salem Capital Flour Mills Company, 31 Federal Reporter, 580, "in a suit to foreclose a mortgage, a prior mortgagee is a proper party defendant, and when so made party he has a right to file and maintain a cross bill for the purpose of having the lien of his mortgage enforced, and procuring a determination of any question concerning its priority or validity that can arise and be litigated between himself and any or all of the parties to the original bill."

IV.

It seems to me also to require no argument to establish that the cross complainants have no adequate remedy other than that which they now seek. It would be extremely inequitable and unjust to compel them, after having been swindled out of $18,000 by the frauds and misrepresentations of Stuart, assisted and participated in by the bank and its officials, to pay the further sum of $15,000 to the receiver, and to look to their fraudulent vendor for reimbursment both of this latter amount and of the purchase price.

Whether or not the Court can, as I think, adjust all the rights of all the parties and compel a restitution by Stuart of the purchase money in this action, it seems very clear to us that the cross bill ought to be retained for the purpose of rescinding the transaction so far as to relieve the cross complainants of liability to the receiver, and to compel him to resort to Stuart alone for the recovery of the assessment. If the time-worn maxim that "fraud vitiates everything" has not lost its meaning, the transfer of the shares is, at the request of Gruetter & Joers, simply void, and if it is void in any respect it is wholly void, and all the rights and obligations of all the parties, except the right of Gruetter & Joers to recover the purchase money, remains in all respects as though it had never taken place.

The ability and experience of counsel for Stuart seem to forbid the assumption that he will contend that the solvency of the bank and the value of the shares were not, under the circumstances of this case, a legal subject of fraudulent representation and warranty. Otherwise the following authorities will, I think, sufficiently establish that they were :

2 Pomeroy Equity Jurisprudence, paragraph 878 and note.

Cole vs. Cassidy, 138 Mass., 437.

National Bank of Dakota vs. Taylor, 58 N. W. R., 297.

Allen vs. Hart, 72 Ill., 104.

Pickard vs. McCormick, 11 Mich., 68.

Swimm vs. Bush, 23 Mich., 99.

Morgan vs. Dinges, 23 Neb., 271.

Kerr vs. James, 39 N J. Eq., 527–543.

The foregoing authorities also establish the proposition that a bank director will not be heard to say that he was innocently mistaken in making untruthful statements concerning the condition of the bank and the value of its stocks in which he was dealing with outsiders.

The foregoing authorities, also, as well as many others, assert the doctrine, which is not, so far as I know, seriously controverted anywhere, that a positive assurance by a vendor of a fact as within his knowledge, which turns out to be false, is itself a fraudulent representation which entitles the vendee to maintain an action to rescind or for damages.

Drake vs. Grant, 4 N. Y. S., 899.
Bullitt vs. Farrar, 43 N. W. R., 566.
Cole vs. Cassidy, 138 Mass., 477.
Chatam Furnace Co. vs. Moffit, 147 Mass., 403.
Chatam Furnace Co. vs. Moffit, 18 N. E., 168.
Wilber vs. De Can, 18 Minn., 421.
National Rank North Dakota vs. Taylor, 58 N. W. R., 297.
Edgington vs. Fitzmaurice, 22 C. L. J., 81.
Kerr on Fraud and Mistake, 54–68–69.
Bigelow on Fraud, 511–513.
Webb's Pollock on Torts, 357–8.

V.

But the Court of Appeals held that the Circuit Court had no jurisdiction of the cross bill because the receiver was entitled to have the transfer from Stuart to Gruetter & Joers se aside upon the mere showing that they were less

able to respond pecuniarily to the demands of the receiver and the creditors of the bank than was Stuart. Says the opinion, "The question was not, therefore, whether the transferees were solvent or insolvent at the time of the transfer, but whether or not the individual liability of the transferees was as valuable as that of the transferer. If it was not, the creditors were damaged, and the fraud was actionable. The evidence leaves this question without doubt." And therefore, says the court, in effect, the transfer could be set aside at the instance of the receiver alone, and the presence of Gruetter & Joers and their cross bill was unnecessary, and the Circuit Court had no jurisdiction of the latter. But suppose the evidence had not left this question without doubt; suppose the Circuit Court was and is, not only in doubt, but clearly of the opinion that the pecuniary ability of Gruetter & Joers was and is as valuable as that of Stuart. Suppose, hence, that it clearly and conclusively appears that, although Stuart knew of the insolvency of the bank, he not only had no actual intent to defeat the receiver and the creditors by means of the transfer, but that the transfer, if upheld, would not have that effect, and that his sole intent and the sole effect of the transaction, if unimpeached, was and will be to defraud Gruetter & Joers. What then? Wouldn't both the original bill and the cross bill have been dismissed and Stuart permitted to go unwhipt of justice? Or, should the cross bill still have been dismissed and a decree for the assessment passed upon the original bill against Gruetter & Joers? Or, should the decree have been that which was in fact entered by the Circuit Court based upon both the original bill and the cross bill? Does the jurisdiction of a court over a contro-

versy depend upon the degree of evidence with which one or some of the parties thereto is or are able to support his or their contentions? Much stress is put by counsel for Stuart and by the Court of Appeals upon the fact that Gruetter & Joers admit and allege in their answer that the intent of Stuart in making the transfer was as well to escape liability as a stockholder, and thus to cheat and defraud the creditors of the bank, as also to shift the liability upon themselves and by so doing to cheat and defraud them out of their property. And so it is contended, in effect, that, having confessed the bill, or at least waived all defense to it, there is no office which their cross bill can fill in the litigation. There are, however, three essential allegations of the bill which are not confessed by the answer and which are not only not proved in the record but are emphatically negatived thereby. These three allegations are: first, that the transfer of the stock was collusive, or pretended, or sham; second, that at the date of the transfer to them they were insolvent, although they admit that the transaction, together with the failure of the bank, resulted in their subsequent insolvency; and, third, that Stuart had any knowledge, notice, or suspicion that they would not be able to respond to an assessment, should one be made in case of failure of the bank. In other words, it is not admitted by anybody, nor is it proved, that Stuart had any actual intent to defraud the bank or its creditors, or that the result appeared to him or to anyone as the natural or probable consequence of the transfer at the time it was made. Are not these allegations or some of them essential? Would a bill framed according to the rule laid down by the Court of Appeals have successfully withstood a demurrer? Would a

bill by the receiver have been sufficient, which alleged merely the organization of the bank, its insolvency, the appointment of a receiver, the making of an assessment, that Stuart had been a stockholder, and that some time before the failure of the bank he became apprehensive of that event and sold and transferred his stock to Gruetter & Joers whose "individual liability was less valuable" than, his own? Is the question of intent immaterial? Is a stockholder in a national bank, which is threatened with insolvency, who sells his stock to a supposedly, and at that time in fact, entirely responsible purchaser, who is as fully informed as to the condition of the bank as he is himself, but who for some reason is willing to incur the risk, an absolute guarantor of the pecuniary responsibility of his transferee? If so, for how long a time does the guaranty continue? What is there in the National Bank Act or the analogies of the law which forbids a stockholder, acting in good faith and without negligence, from contracting with some other person of supposed responsibility to accept his shares and assume his liability? I confess that I do not know nor have I found any adjudicated case, except this, in which a transferer of such stock has been held subsequently liable for an assessment thereof, except the transfer was collusive or intentionally made to one known to be pecuniarily irresponsible or there had been some other similar element of actual fraud. I think that the furthest this court has ever gone, and as far as it can go consistently with the statute and the analogies of the law, is in the following language from the opinion in Bowden vs. Johnson, 107 U. S., 251: "Where the transferer possessed of information showing that there is good ground to apprehend the failure

of the bank, colludes and combines, as in this case, with an irresponsible transferee *with the design* of substituting the latter in his place, and thus leaving no one with any liability to respond for the individual liability imposed by the statute, in the respect of shares of stock transferred, the transaction will be decreed to be a fraud on the creditors, and he will be held to the same liability to the creditors as before the transfer. He will be still regarded as a shareholder *quoad* the creditors, although he may be able to show that there was a full or partial consideration for the transfer as between him and the transferee."

With this rule there can be no complaint because the guilty knowledge and the fraudulent intent are both present. But that is not the case at bar. Here there was the knowledge of impending failure, but there was no intent or design to defeat the creditors of the bank. There was no collusion or combination, and both parties intended that there should be nothing sham or colorable about the transaction.

In Pauley vs. State Loan and Trust Co., 165 U. S., 606 (17 Supreme Court Reporter, 465), there is a generalre view of the decisions of this Court upon the subject, and one of the rules relating thereto as laid down in the opinion is as follows: "That if the real owner of the shares transfers them to another person, or causes them to be placed on the books of the association in the name of another person, *with the intent simply to evade* the responsibility imposed by section 5151 on shareholders of national banking associations, each owner may be treated, for the purposes of that section, as a shareholder and liable as therein prescribed."

No fault can be found with this rule, but Stuart's intent was not so simple. His purpose was not only to evade his own liability but to impose the liability upon Gruetter & Joers, whom he believed to be abundantly responsible. It is true that in Bank vs. Case, 99 U. S., 628, Mr. Justice Strong, speaking for the Court, quotes with approval the following language from Thompson's Commentaries on Corporations, paragraph 3259: "A transfer of shares in a failing corporation made by the transferer with the purpose of escaping his liability as a stockholder, to a person who from any cause is incapable of responding in respect to such liability, is void as to the creditors of the company and as to other shareholders, although as between the transferrer and the transferree it was out and out." And the opinion cites certain judicial decisions as supporting the proposition. These authorities, which Mr. Justice Strong seems to have taken without careful examination, do not support the proposition without qualification. In all the cases cited in the opinion, or in the note, in which the liability was enforced against the transferrer, it was shown by direct testimony or by circumstances, or both, that he knew or had good reason to believe that the transferee was insolvent or likely soon to become so, or that the transfer was sham or collusive with the intent on the part of the transferer not simply to escape liability, but to defeat the company and its creditors of any remedy against any responsible persons. All these features are entirely absent from the case at bar. Several of the authorities cited by Mr. Thompson expressly negative the proposition above quoted from his text. Thus Miller vs. The Great Republic Insurance Co., 50 Mo., 55, is quoted with approval in Provident Savings Institution vs.

The Jackson Place Skating and Bathing Rink, 52 Mo., 557, as having held: "That where before execution against a corporation the stockholder honestly and without any intention to defeat the creditors of the company sold and transferred his stock, the mere fact that the purchaser was insolvent at the time was not sufficient to hold the stockholder liable for the debts."

In Marly vs. Clark, 17 Mass., 329, the Court goes no further than to hold: "We cannot doubt, then, that a transfer of an interest in the stock of such corporations not *bona fide, but for the purpose of defeating the creditors of the company*, is fraudulent and void." The italics are mine. This seems to me to be the true rule. It is not the intent of the transferer to escape liability, but his intent to defeat the creditors and stockholders of the company, which renders the transfer fraudulent and void. This rule is in harmony with legal analogies; the other is not. This rule places no undue or unnecessary restraint upon the right of transfer which it is the policy of the law to promote; the other hampers and restricts it without cause. Consequently, the Supreme Court of California in Moore vs. Boyd, 74 Cal., 167 (15 Pac. Rep., 670), distinctly and expressly repudiates the Thompson rule. In fact, if the rule were as stated by Thompson it would never be pertinent to inquire whether the transferee was solvent or insolvent. The necessary effect of a transfer of stock in a national bank is to relieve the transferrer of liability. He must be conclusively presumed to have intended the inevitable consequences of his own act. Hence, all that would be necessary for the receiver to show, under this rule, would be that

the bank was insolvent within the legal knowledge of the transferrer at the time of making the transfer. Except in the case at bar, no Court has ever so held. If this was the law, the inquiry discussed in Thompson's paragraph No. 3261 and by the decisions cited in his notes to that paragraph would be of no importance. That inquiry is important, however, because it helps to determine the question, not whether the transferrer intended to escape liability, but whether he intended to defeat the corporation and its creditors, and can be important for no other purpose.

I hope your honors will pardon me for concluding this part of the argument with the following illustration: I am the owner of a hundred shares of stock in the Skagway National Bank, of which I am also a director. I believe, from facts within my knowledge, that the capital of the bank is to some extent impaired and am, on that account, apprehensive of its failure and insolvency. My friend Jones, whose knowledge of the condition of the bank is equal to my own, is the owner of a placer mine on the Klondike which he wishes to sell. I have no doubt nor reason to suspect that Jones is not well to do and abundantly able to respond to an obligation for ten thousand dollars. I go to him and say, "Jones, you know all about the Skagway bank. I am afraid it is about to fail. On the other hand, you think it is safe. Now, you want to sell your placer diggings on the Klondike. I will give you my stock in the bank for your claim." "All right," says Jones, "I am satisfied the bank is all right, and I will trade." And we do trade. Shortly afterwards, it turns out that I was right and Jones was wrong. The bank fails, and the

failure of the bank, together with various other unfortunate business transactions, cause the failure of Jones also, equally to his surprise and my own. Whom have I wronged, actually, intentionally, or constructively? An event has taken place which the bank, its stockholders and creditors, Jones, nor myself, in the exercise of reasonable intelligence and prudence did not foresee and could not have foreseen. Fraud is defined to be a deceit by which another is misled to his injury. I have not deceived anybody, nor even innocently misled anybody by my conduct. All that I have done has been in full agreement with the strictest ethical rules of conduct. Why should I be punished by being compelled to pay the comptroller's assessment? There is only one answer. It is not that *ita lex scripta est*, because the law has never been so written, but it is that Seymour D. Thompson, a fake law writer of St. Louis, and the United States Circuit Court of Appeals of the 8th Circuit, has so ordered.

Unless, therefore, the Court advances beyond the doctrine laid down in any of its own carefully considered decisions, no case is made in this record for setting aside or disregarding the transfer of the shares in question at the instance of the receiver, and in the absence of the cross bill a decree should have passed under the prayer for general relief against the defendants thereto, Gruetter & Joers.

This last consideration seems to me to be a sufficient answer to the contention of counsel for Stuart and to the ruling of the Court of Appeals that the cross bill is not defensive to the original bill or rather to the complainants' amended bill. To this latter document Gruetter & Joers

were made parties, and they were required by subpœna to make full and true answer thereunto. The charges contained therein of collusion and combination, of their own insolvency at the date of the transfer, and of a fraudulent intent either on their own part or on that of Stuart to defeat the creditors of the bank or to prevent a collection of the assessment, and which were essential to a recovery by the receiver against Stuart, they could not and did not admit, because they were not true, and they knew, as the event proved, that they could not be proved. The amended bill contained a prayer for general relief, and, in case of their failure to appear and answer thereto in obedience to the subpœna, was subject to amendment without notice to them. In case of their default Stuart might have been excused and judgment rendered against them. But, although the receiver had not sufficient cause for setting the transfer aside, Stuart had been guilty of such wrongs towards them as conferred upon them right to that relief, and an opportunity for seeking it would never again be presented. This was the precise office of a cross bill as defined by the late Mr. Justice Miller in Schenk vs. Peay, 1 Woolworth, 165, Fed. Cases, 12450. The fact that their contention tended to aid the receiver in his attempt to recover from Stuart was a mere incident. If the statements of their cross bill were true—and they were proved to be—they had a right to have the transfer set aside and to have the responsibility of Stuart exhausted for the payment of the assessment before resort should be had to them. The exercise of this right would have been a restraint upon the receiver not the less because he was willing to pursue that course if the facts justified him in so doing. But suppose they had not asked

for relief in their own behalf; suppose there had been no cross bill and that the record had shown, as counsel for Stuart insists that it did show, that Gruetter & Joers were not only abundantly responsible at the date of the transfer, but continued so to be for months afterwards and down to the date of the hearing. In such case would not Stuart have been absolved and a decree passed against his co-defendants? That such might properly have been the result under the prayer for general relief is established by Tyler vs. Savage, 143 United States, 79, reported in S. C. R., page 340.

Suppose that Gruetter & Joers, instead of filing their cross bill, had exhibited an original bill exactly like it, would not the two causes having the same parties and relating to the same transaction have been consolidated, so that there would have been but one record of proofs, but one hearing, and but one decree which would have passed upon both bills? "A cross bill" says this Court, in Kingsbury vs. Buckner, 134 U. S., 650, quoting with approval from the opinion in Jones vs. Smith, 14 Ill., 229, "is proper whenever the defendants, or any or either of them, have equities arising out of the subject matter of the original suit which entitles them to affirmative relief which they cannot obtain in that suit." So, in Hurd vs. Case, 32 Ill., 45, the Court says, quoting from the syllabi: "When a defendant in chancery is entitled to affirmative relief in respect to the subject matter of the original suit, he can only obtain it by means of a cross bill."

"A cross bill must be confined to the subject matter of the original bill, *but the only limitation* as to new averments

therein is that they must grow out of and be connected with the subject matter of the original bill."

I am unable to distinguish between the principle for which I am now contending and that announced in this Court in Morgan's L. & T. R. and S. S. Co. vs. Texas Central Ry. Co., 137 U. S., 171, and 11 S. C. R., 61. In that case this Court says: "A cross bill," says Mr. Justice Story, (Ex. Pl., Sec. 389) *ex vi terminorum* implies a bill brought by the defendant in a suit against the plaintiff in the same suit or against other defendants in the same suit, or against both, touching the matters in question in the original bill." A bill of this kind is usually brought, either (1) to obtain a necessary discovery of facts in aid of the defense of the original bill, or (2) to obtain full relief to all parties touching the matters of the original bill." And as illustrative of cross bills for relief, he says (section 392): "It also frequently happens, and particularly if any question arises between two defendants to a bill, that the court cannot make a complete decree without a cross bill, or cross bills, to bring every matter in dispute completely before the court, to be litigated by the proper parties and upon the proper proofs." It seems to us that in order that a decree might be made upon the whole matter in dispute, brought completely before the Court, the bill in question was necessary, and was correctly styled a "cross bill." In no proper sense were new and distinct matters introduced by it which were not embraced in the original and amended and supplemental bills, and, while it sought equitable relief, it was such as, in point of jurisdiction over the subject matter, the Court was competent to administer. It may be that, so far as it

sought the further aid of the Court beyond the purposes of defense to the original bill, it was not a pure cross bill, but that is immaterial. The subject matter was the same, although the complainant in the cross bill asserted rights to the property different from those allowed to it in the original bill and claimed an affirmative decree upon those rights. A complete determination of the matters already in litigation could not have been obtained except through a cross bill, and different relief from that prayed in the original bill would necessarily be sought. This bill was filed, on leave, before the testimony was taken, and though there should be as little delay as possible in filing bills of this kind, yet that was a matter entirely within the discretion of the court, which could have directed it to be filed even at the hearing. And whether this bill be regarded as a pure cross bill, as an original bill in the nature of a cross bill, or as an original bill, there is no error calling for the disturbance of the decree because the Court proceeded upon it in connection with other pleadings. The jurisdiction of the Circuit Court does not depend upon the citizenship of the parties, but on the subject matter of the litigation."

It is true that a part of the relief sought by the cross bill in the case at bar does not differ materially from that sought by the amended bill of the complainant, but it is sought on entirely different grounds and upon facts which that amended bill ignores or denies, and, in the language of the opinion just quoted, "a complete determination of the matters already in litigation could not have been obtained except through a cross bill," and in fact will not be obtained if the judgment of the Court of Appeals shall be affirmed.

This appears, also, sufficiently from Tyler vs. Savage, 143 U. S., 79, already cited. Had Tyler been able to show by cross bill in that case that he was free from fraud and was, in common with the complainant, a victim of fraud by the company, he would have been enabled, not only to escape a decree against himself, but to have obtained restitution for whatever damage he had sustained by reason of that fraud. It may well have happened that the Circuit Court were of opinion that the case presented by the amended bill was not made out by the proofs, but that the case made by the cross bill was established thereby, and, if so, the decree of the Court based upon both bills was the only one that could properly have been passed. If the Court took this view, which the presiding judge announced orally at the time that he did take, it is clear to my mind that no error was committed in the determination of the cause. That the cross bill made a sufficient case for the relief granted by the decree and that the decree was no broader than was necessary for "a complete determination of all the matters in litigation" is shown not only by the opinion in Morgan's Co. vs. the Ry. Co., 137 U. S., 171, just cited, but in the decision elsewhere herein more fully referred to, and very similar to the case at bar, of the Florida Land and Improvement Co. vs. Merrill 52 Fed. Rep., 77. In support of the proposition that a Court of Equity having jurisdiction for any purpose will adjudicate the whole controversy and grant whatever relief may be necessary to that end, including an award of money by way of damages, compensation, or restitution, it cannot be necessary in this Court to cite additional authorities. Attention is invited, however, to Russells vs. Clarks express, 7 Cranch. 69, and to the text and notes in 1 Pome-

roy on Equity Jurisprudence, sections 181–223, and 231 *et seq.*

VI.

With an air of profound wisdom that fills the inexperienced country practitioner with inexpressible awe and admiration, the Court of Appeals announces that one who would rescind a contract must act promptly and without vacillation, and return, or offer to return, to the other party whatever of value he may have received by reason of the contract. Quite so. This is a proposition which, so far as I know, has never been disputed by lawyer or layman. Certainly not since the king's writs began to bear teste at Westminster, nor probably since the building of the first Roman basilica. A very cursory examination, however, of the authorities cited in this paragraph makes it quite plain that the principle has no application to the facts of the case at bar. If by means of fraud or false warranty I sell you an unsound or vicious horse for which you pay me a hundred dollars in money or securities, or both, you, upon discovering the cheat, may sue me for damages, thus affirming the contract, or you may return or offer to return the horse and sue me for recovery of the purchase price. This latter remedy is rescission, and the other is not, and if you pursue the other remedy first, or do any other act amounting to an affirmance you will be held so have elected, and your remedy of rescission will be gone. Nobody ever doubted this to be so. But, if you sell me a horse for five hundred dollars, four hundred of which I pay in money, and for the other one hundred of which I deceitfully induce you to accept a forged note, you may, upon discovering the cheat, sue me for the amount for which you accepted the note, or,

what is the same thing, the unpaid residue of the purchase money, and it has never hitherto entered into the mind of man that as a condition for so doing you must return me the four hundred dollars, so that I will have that sum as well as the horse and the money I have swindled you out of. Your action in such case is not only not for rescission, but it has not the least or most remote resemblance to that remedy. You do not sue for damages for the breach of contract of sale, because you do not allege that it has been broken, except by my default in payment, and you do not seek to rescind it because if you did so successfully, the contract being gone, you could have no action either for damages for its breach or to recover the unpaid portion of the contract price. What you in fact do is to sue upon the contract to compel its fulfillment by me. In such case your remedy at law would be complete, but if instead of a forged note I had induced you to accept a share of stock in an insolvent national bank you would have been compelled to resort to a court of equity, which alone would have been competent to relieve you from the burden of the assessment which you would have unwittingly assumed, and to such a suit the bank, or, in case of its insolvency, its receiver, would have been a necessary party defendant. But by so doing you do not rescind or attempt or propose to rescind the contract of sale of the horse, nor, because a court of equity is alone competent to enforce the contract, are you restricted to the remedy for its rescission. The Court of Appeals holds, in effect, that you are so bound; that you must either sue me at law for damages for a breach of the contract, which, however, I have nominally not broken, or tender me back the stock and the four hundred dollars and replevy the

horse which you do not want. After having done which, you would still be obliged to apply to a court of equity to obtain relief from the assessment. But it might well have happened, as in fact it did happen in the case at bar, that as soon as you got the four hundred dollars and before you had any knowledge or suspicion that you had been swindled by means of the stock, you had paid out the four hundred dollars in part payment of your own indebtedness and thus became powerless to tender that sum to me, so that, wholly without your fault, and by force of circumstances practically beyond your control, your remedy by rescission of the contract had been lost to you. As a matter of fact that is just what did occur in the case at bar: immediately upon closing the trade, and before Gruetter & Joers had any suspicion that they had been swindled, or that the bank stock was not as represented to them by Stuart, they paid out the nineteen thousand five hundred dollars received by them from him in discharge of their merchandise and other debts (see record, 150):

Q. Now, if the assessment had been collected at that time—at the moment of transfer—did you not have $15,000 in cash in your hands?

A. I don't know at the time or not whether I had or not. The most of them were certificates of the Capital National Bank.

Q. You collected them afterwards, did you not?

A. Yes, we did.

Q. So they were cash?

A. Yes, sir.

Q. And you had $19,500 from Professor Stuart at the very moment you received the transfer?

A. At the very moment we received them we turned part of them over to the bank for borrowed money and paid for merchandise east with them.

Q. Gruetter & Company had the benefit of it?

A. Yes, sir; certainly.

If the court of appeals is right, what were you to do in such case? Although the owner of considerable property and perfectly solvent, in the ordinary sense, you may not have had or been able to procure a hundred dollars with which to pay the assessment, but if you had had it would you have been compelled to pay it out for that purpose and then sue me for it together with the other hundred dollars unpaid purchase money, and have taken your chances of my beating an execution on your judgment? So the Court of Appeals seems to think. And possibly, too, if you had paid the assessment without objection, you would have been held to have "ratified" the transaction with respect to the stock, and would never have been able to obtain any judgment against me at all. In fact, under such circumstances you would have had no remedy at all as respects the assessments except that sought by the cross bill in the case at bar which the Court of Appeals dismissed. The upshot of the matter is that this new doctrine of the Court of Appeals makes your choice of remedies or right of election dependent not upon your volition, but upon my own, and upon circumstances beyond your control. Suppose, too, that I had sold and delivered the horse to some one outside the state, or broken one of his legs, or blinded his eyes, or taught him to kick, or run away, how about your remedy of rescission then? Or, take the case at bar:

suppose Stuart had conveyed the building to the man in Maine immediately after procuring title, or incumbered it, or burned it down, or suppose, owing to some commercial disaster or to indefinable general causes, it depreciated largely in value, as in fact it did do mainly because of the failure of the bank which was the sole cause of Gruetter & Joers' complaint; how about the remedy of rescission then? A right of election that forbids a man to elect or that limits his choice by the volition of his adversary or by contingencies beyond his influence or control is not a right of election at all, and the assertion that it is so is a contradiction in terms which to a country lawyer seems to be absurd.

In the case at bar, Gruetter & Joers were made parties to the amended bill and brought in by subpœna at the instance of Stuart. Suppose they had not exhibited their cross bill, but had filed their answer merely, or had suffered a default, and that a decree had been rendered by the Circuit Court against Stuart alone for the assessment. Suppose, then, that the decree had been pleaded by Stuart in bar of the suit in the State Court. Might not the last named Court have properly held that, having been parties to the suit in the Federal Court and had an opportunity to present the whole controvesry by cross bill so as to obtain a final determination of all the rights of all the parties growing out thereof, it was our own fault or negligence if we had not done so and that the same transaction would not be a second time investigated and that the plea should be sustained? Gruetter and Joers were in a "dilemma." I think that is what it is called by judges and by eminent lawyers who know how to use the language with an appet-

izing spice of Greek and Latin derivatives. Our Saxon forefathers might have said they were between "Old Nick and the Deep Sea."

If they had suffered default, or, answering, had confessed the allegations of the amended bill, they would have admitted that they had "colluded and combined" with Stuart to defeat the creditors of the bank by means of a sham and pretended transfer of the stock, and, in the face of such an admission, neither the Federal nor the State Court would have helped them either to recover the residue of the purchase price or to be relieved from the assessment. It would have been a sufficient defense in either case that they were by their own admission "particeps criminis." They were compelled, then, to answer the fact, viz.: that whether or not one of Stuart's objects was to defeat the creditors of the bank, which it might, for all they knew, have been, it was clear that one of his purposes and probably his main, if not his only, purpose, was to cheat and defraud them. So that, so far from "colluding and combining" with Stuart for any unlawful purpose, they had dealt with him in the most perfect good faith; that they had accepted his stock at twenty per cent premium in part payment for their property without any knowledge, notice, or suspicion that he was attempting or intending to cheat or defraud anyone, least of all the bank or its creditors, and that such being the facts no decree for the assessment ought to be rendered against them. So far as these facts were pleaded in their answer and sustained by the proofs they were defensive only, but they called for an investigation of the whole matter in dispute, and if they thought themselves entitled to any affirmative

relief by reason of them they were admonished, by elementary principles of jurisprudence, that they must demand it then, by apt pleadings, that is, by cross bill, or be forever after shut out, because, as already said, no Court would ever again investigate the same transaction for the determination of the same issues. All the relief they were entitled to upon these facts and issues they must claim and get then or forever after hold their peace. Their right was in the nature of a counterclaim, and it is settled law that if it had been used once for defense it could not have been again used for an affirmative judgment. This rule is very clearly and emphatically stated and enforced in Brirer vs. Fretz, 37 Kan., 37; S. C., 14 Pac. Rep., 558, the syllabus in which is as follows: "Where certain facts are pleaded as a defense in an action, and a final judgment rendered therein, necessarily deciding the merits of such defense, the same facts cannot again be the basis of an action between the same parties arising out of the same transaction, though in the former action the facts were pleaded as a defense only, and no claim made thereon for affirmative relief."

The opinion in O'Connor vs. Varney, 10 Gray, Mass., 231, seems to me to be exactly in point, and is as follows: "The presiding judge rightly ruled that the former judgment was a bar to this action. A party against whom an action is brought on a contract has two modes of defending himself. He may allege specific breaches of the contract declared upon, and rely on them in defense. But if he intends to claim, by way of damages for non-performance of the contract, more than the amount for which he is sued, he must not rely on the contract in defense, but must bring a cross ac-

tion, and apply to the court to have the cases continued so that the executions may be set off. He cannot use the same defense, first as a shield, and then as a sword. Bennett vs. Smith, 4 Gray, 50; Sargent vs. Fitzpatrick, 4 Gray, 511; Sawyer vs. Woodbury, 7 Gray, 499."

In Burnett vs. Smith, 4 Gray, 50, the first syllabus is as follows:

"To an action on a promissory note given in payment for goods, the defendant pleaded want of consideration, by reason of false representations of the payee concerning the value of the goods, and the plaintiff recovered judgment for a part only of the note. *Held*, that the defendant was barred of his action for false representations."

But it cannot be necessary to multiply citations upon so plain a point. A large number of authorities to the same effect are collected in paragraphs 173–174 of Vol. 1 of Van Fleet's Former Adjudication, and attention is especially called to Horner vs. Kilander, 135 Ind., 600 (34 N. E., 697), set forth at large as a note to paragraph on page 441.

The contention by counsel for appellant, that cross complainants are remediless, unless and until they make a tender or repayment of the sum of money, amounting to about $19,500 which Stuart paid them as part consideration for the conveyance to him of the real property, arises from an entire misconception of the case and of the rights of the parties arising thereunder. Gruetter & Joers did not trade with Stuart for his stock, but sold him their property for $37,500 subject to an incumbrance. With this sale

they are entirely satisfied. They have no desire to rescind it, and it is extremely doubtful if they could successfully maintain an action so to do. There was no fraud or mistake mutual or otherwise, concerning it. They agreed to sell, and did convey, the property for the agreed consideration stated, but Stuart, instead of paying them that sum, paid them $19,500 only, and fraudulently induced them to accept for the remaining $18,000 some bank shares which were not only valueless, but threaten them with a personal liability of $15,000 and interest. It is this wrong which they seek to have redressed.

They are entitled to be paid the residue of their purchase money, and to be relieved from an obligation which they unwittingly assumed, and are not required, as a condition therefor, to buy justice, either by foregoing the benefit of their sale or by repaying Stuart the $19,500, which he did pay them on account of his purchase from them. The language of the court in Pierce vs. Wood, 23 N. H., 519–534, is accurately applicable to the case at bar. The court say

"The doctrine of the rescission of contracts will hardly apply to a case of this kind. The whole foundation of the plaintiff's right to recover rested upon the question of fraud. If fraud was made out, then the plaintiff could recover, otherwise not; and the whole trial proceeded upon that ground. Fraud being established, the compromise became void, and the plaintiff's entire debt would at once be revived and a clear right of action exist in his favor. And it appears to us that it would be a singular doctrine to hold that, before an action can be maintained to recover the balance, that portion of the plaintiff's demands which have been paid must

first be refunded; that before he can institute a suit for the amount out of which he has been defrauded, he must first repay that which was honestly his due, and which, so far as he was concerned, he has honestly received. Such a rule would be offering a premium for fraud; and in most cases of this kind a plaintiff might better retain the per cent which he has received than relinquish that for the uncertainty of recovering the whole."

This case was expressly approved and followed in the somewhat similar case, Moody vs. Brown, 58 N. H., 45. That case arose out of the following facts as stated by the Court:

"When the defrauded party elects to treat a fraudulent exchange of chattels as void, and the other party's possession of his property as tortious, a demand is not necessary to enable him to maintain trover.

"And when the title of the chattel received by him, fraudulently represented to be good, had wholly failed, he may rescind the exchange without transferring to the fraudulent party a good title which he has obtained from a third person.

"The measure of damages in such a case is the value of the property received by the defendant in the exchange.

"In trover for a receipted account of the plaintiff against the defendant, the measure of damages is the value of the document. There is no legal presumption that its value as a chattel is the value of the chose in action or the amount of the debt set forth on the paper."

In the opinion the court say:

"When a plaintiff has been fraudulently induced to receive part payment in full satisfaction of the defendant's debt, on a compromise, he can recover the balance without returning what he received."

In Martin vs. Roberts, 5 Cushing, 126, the syllabus prepared by the court is as follows:

"Where the vendor of an article received in payment therefor a promissory note of a third person, falsely and fraudulently represented by the vendee to be solvent, together with an order on a third person for goods, which was duly paid, and the vendor returned the note to the vendee on discovery of the fraud, it was held that the vendor might maintain an action of assumpsit to recover the price of the article sold, deducting therefrom the amount of the order, without returning the latter."

And in the opinion the court say:

"The defendant insists that this action cannot be maintained, inasmuch as the plaintiff has not returned the order for groceries, taking the position that, without returning the entire consideration, the plaintiff has no right to maintain his action for the price or any part thereof. Various authorities were cited by the counsel for the defendant to establish the doctrine that, if a party would rescind a contract entered into through fraud or misrepresentation, he must return the whole consideration received. In the case of rescinding a contract, in the full and proper sense of the term, this may be so, but the doctrine has no application to

a case like the present. If the plaintiff had sought to recover, in an action of replevin, the specific articles sold to the defendant, and had not returned the order for groceries, the objection might have been well taken that, before the plaintiff could enforce a claim to property in the articles thus sold, he must restore to the other party all the valuable consideration that he received from him.

"But the plaintiff does not seek to rescind the contract of sale, or to reclaim the property sold by him to the defendant. He gives full effect to the sale; he counts upon it in his writ, and only seeks to recover damages by reason of non-payment of the same. Such non-payment he seeks to establish by proof that so much of the payment as was to be realized from the note of John Thing has entirely failed to be realized by reason of the worthlessness of that note, which note, it was agreed, was taken upon the false and fraudulent representation of the defendant as to the solvency of the maker.

"This being the case, the defendant has failed, to the amount of this note, to pay the plaintiff for the articles bought of him. It is as though no such note had been delivered to the plaintiff, and to this extent the plaintiff is the creditor of the defendant on account of the articles sold. The principle upon which the right of the plaintiff to recover rests is a very clear one, and will entitle him to retain his verdict. The supposed payment has proved delusive. The vendor received in payment an article of no value, and this through the fraudulent representations of the defendant. He may demand that this loss may be made

good to him. Puckford vs. Maxwell, 6 T. R., 52; Young vs. Adams, 6 Mass., 182, and cases there cited."

In Bridge vs. Batchelder, 9 Allen, 394, the syllabus is: "One who, as part payment for goods sold, has received promissory notes of a third person upon false and fraudulent representations by the purchaser that the notes were given for value and were good, may maintain an action against such purchaser to recover so much of the price of the goods as the notes were intended to pay without first offering to return the notes. It is sufficient if they are filed in court at any time before final judgment in the action."

And in the opinion the Court say, Bigelow, C. J.:

"We are unable to see any insuperable legal obstacle in the way of plaintiff's recovery in this action. The evidence as stated in the exceptions was amply sufficient to warrant a jury in finding that the plaintiff's intestate was induced to take the notes of Cook in payment for a portion of the purchase money of his share of the schooner by the false representations of the defendant, made fraudulently with an intent to deceive, the defendant well knowing the representation to be false. If so, then it is clear that the purchase money has not been paid in full, and the plaintiff can well maintain an action of assumpsit to recover so much of the agreed price as the notes of Cook were intended to pay. The case stands as if the defendant had given counterfeit bank notes in payment, knowing them to be false and representing them to be genuine.

"It is no answer to say that the whole contract for the sale and purchase of one-eighth of the schooner is not re-

scinded, and that the plaintiff still retains a portion of the consideration which was paid therefor. This ground of defense might have been available in an action brought to recover back the thing sold. But this action does not proceed at all on the ground of rescission. On the contrary, the plaintiff affirms the sale fully, and only seeks to recover damages consequent on the non-payment of the stipulated price. The alleged payment has proved to be inoperative by reason of the false and fraudulent representations of the defendant. This point was distinctly adjudicated and settled as the law of this commonwealth in Martin vs. Roberts, 5 Cushing, 126, a case very like in its facts to the one at bar."

"Nor is it at all material that the worthless notes which were delivered to the plaintiff's intestate were not given up and surrendered to the defendant before or at the trial of the case. The omission to do so can have worked no possible harm to the defendant, and substantial justice would have been done if the plaintiff had placed them on the files of the court to be delivered to the defendant at any time before final judgment should have been rendered in his favor. This can now be done in the event that upon a new trial he shall establish the alleged false and fraudulent representation s."

VII.

The contention that cross complainants were required, as a precedent condition to maintaining their bill, to return or tender the certificates of stock has even less foundation than the other. The certificates are not the shares, but merely evidences of the ownership of them, and the sole object of

the cross bill is to restore that ownership to Stuart by compelling his reinstatement as shareholder upon the books of the bank, and obtaining a decree of the court that he is, and at all times had been, the true owner of the stock. If there is any more emphatic or unequivocal way of making a tender it is hoped that counsel for appellant will point it out.

However, the doctrine that one who seeks to rescind must restore, or offer to restore, the *status quo*, is not, as counsel seems to suppose, a hard and fast rule of law, but an equitable principle only. Consequently courts of equity do not require its observance except in cases in which such requirement is indispensable to the equitable adjustment of the rights and obligations of the litigants. The nature, extent, and limitations of the doctrine are well stated in the opinion of the Court in Babcock vs. Case, 61 Penn. State, 427, from which I quote the following:

"As a general rule, in the cases of executed contracts, this is true. Rescission on the ground of fraud, failure of consideration, and the like is a right in equity subject to a restoration of the consideration; consequently, in order to obtain equity, it lies on the party seeking it to do equity; that is to say, he must return the property obtained or reconvey the title. If this be the equitable requirement, a failure in that particular would ordinarily be followed by a denial of the equity demanded. But if the thing, the consideration for which is sought to be recovered back, be entirely worthless, there would be no duty to return it. Thus we hold in Flynn vs. Allen, a case from Potter county, 7 P. F. Smith, 482. We decided that the return of the worthless township orders bought by plaintiff from the defend-

ants was not essential to the plaintiff's right of recovery. As nobody can have an equity in a thing worthless in itself, it must follow that the restoration of such a thing will not be required in equity. Wherever the question of restoration arises it is an equitable question, and is to be dealt with on equitable principles. If there be no value in the conveyance, for instance, and no right of recourse on any one for a reconveyance, would the want of such a reconveyance having been tendered outweigh a plaintiff's equity to have his money back, who had been egregiously defrauded? If it would not, a reconveyance would not be required. It is only required in order to prevent the party holding the thing paid for, and recovering the price, also, that a return is essential in equity. If the thing be worth nothing, of what consequence is a reconveyance or return of it?

The plaintiff below did not show that a reconveyance by the plaintiff to him would be of any value. What equity had he to have it therefore? It must be remembered that if the plaintiff was defrauded it avoided the conveyance, and his right was complete to his money. It never lawfully passed out of him. The right to have it again depended on what might appear in the defense. He could not know that the defendant would insist on a reconveyance of a worthless title, and was not bound to make a reconveyance or tender one. If any value appeared in it, however, a condition to reconvey in the verdict would effectually do equity to the premises. Indeed, after verdict, if it should come to light that a reconveyance ought to be made, it is within the equitable power of the court to restrain execution until it be made. In all cases, therefore,

the equity of the defendant is to be judged of and administered, if it be an equity at all, and if it be not, the claim goes for nothing. If equity required a reconveyance to precede suit, it will be so administered; if it can be protected on the trial as it may in almost every possible case, it will be so administered. If there be no equity in the case, but only an assumption of it, it ought to be disregarded. That was the category, it seems to us, in which the defendant's claim to equity stood. Should the court below be of opinion, however, that justice demands a reconveyance to be made to the defendant, it might restrain the execution until it be made."

To the same effect is Smith vs. Smith, 30 Vt., 139, and generally when one party has been guilty of actual fraud a tender of restitution is not required of the plaintiff.

1 Bigelow on Fraud, 429, and notes.
Gould vs. Cayuga Bank, 86 N. Y., 75.
McCaskey vs. Graff, 23 Penn. State, 321.
Sands vs. Codwise, 4 Johns., N. Y., 597.
Gilbert vs. Hoffman, 2 Watts, 66.
Weeden vs. Hawes, 10 Conn., 50.
Knappen vs. Freeman, 47 Minn., 491.
Nelson vs. Carlson, 55 N. W. R., 84.
McCorkell vs. Korhoff, 58 N. W. R., 913.

VIII.

Enough has already been said, it is hoped, with respect to promptitude of action on the part of cross complainants.

The action in the state court, which is a repudiation of the

transfer of the stock, was begun on the first business day after the bank suspended and the plaintiffs became aware that the shares were valueless. They answered and filed their cross bill in this action as soon as they were challenged so to do by subpœna issuing out of the Circuit Court. The pendency of the suit in the state court is no bar to the cross bill, *first*, because cross complainants are not voluntarily here, but, being here, are entitled to have all their rights adjusted and to avail themselves of all the remedies appropriate in the proceeding to which they have been made parties. *Second*, because the parties to the several suits and the relief sought are not the same. The remedy pursued in this action is not within the power of the state court to grant. *Third*, because a suit in one jurisdiction cannot be pleaded in bar or abatement of a subsequent suit in another jurisdiction between the same parties seeking identical relief.

Kilpatric vs. Kansas City and B. R. R. Co., 38 Neb., 620–641.
Gordon vs. Gilfail, 99 U. S., 168.
Sharon vs. Hill, 22 Fed., 28.
Stanton vs. Embrey, 93 U. S., 548.

IX.

Probably it will not be contended that the act of congress of 1887 affects the jurisdiction of the circuit court in suits to which national banks are parties in cases in which a Federal question is involved. If so, the matter was set at rest in Petri vs. Commercial National Bank, 142 U. S., 64.

The contention that the controversy upon the cross bill is wholly between the complainants and the defendants therein is without foundation. The relief sought thereby against the receiver is of precisely the same character as that prayed and obtained by original bill, in Florida Land and Improvement Company against Merrill, 52 Fed., 77, and in Schenck vs. Peay, 1 Woolworth, 175.

It is true no injunction is prayed because the final decree discharging cross complainants from liability to the receiver renders one unnecessary, but it will scarcely be contended that such a decree would be effectual as against the receiver if rendered in a preceeding to which he was not a party. On the other hand, it will doubtless not be argued that such a decree in a suit to which Stuart was not a party would obligate him to pay the assessment or be in any way conclusive upon him in a subsequent action by the receiver against him. If it be granted for the sake of argument that Gruetter & Joers are entitled to that portion of the relief awarded them by the decree of the circuit court by which they are relieved from the assessment and liability therefor is imposed on Stuart, then it is very clear that such relief could only be obtained in a suit in which Stuart and the receiver are both parties defendant. And whether they are entitled to do it or not, the question whether they are so under the circumstances of this case is one which requires for its solution the interpretation of Federal laws and statutes, and otherwise cannot be answered. So that it seems that the jurisdiction of the circuit court over the controversy to this extent is beyond dispute. Such being the case, the authorities above cited warrant no other conclu-

sion than that the Court rightly adjudicated all the controversies between all the parties which are connected with, and auxiliary to, the subject matter within its jurisdiction, and that the decree of the circuit court is right and ought to be affirmed.

JOHN H. AMES,

Solicitor for Gruetter & Joers, Cross Complainants.

No. 151.

JAMES H. McKENNEY, CLERK

Brf. of Plaintiff in Error for Appt.

Filed Nov. 19, 1894.

SUPREME COURT
UNITED STATES.

OCTOBER TERM, 1894.

No. 151.

AMBROSE P. S. STUART,

Appellant,

vs.

KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA,

Appellee.

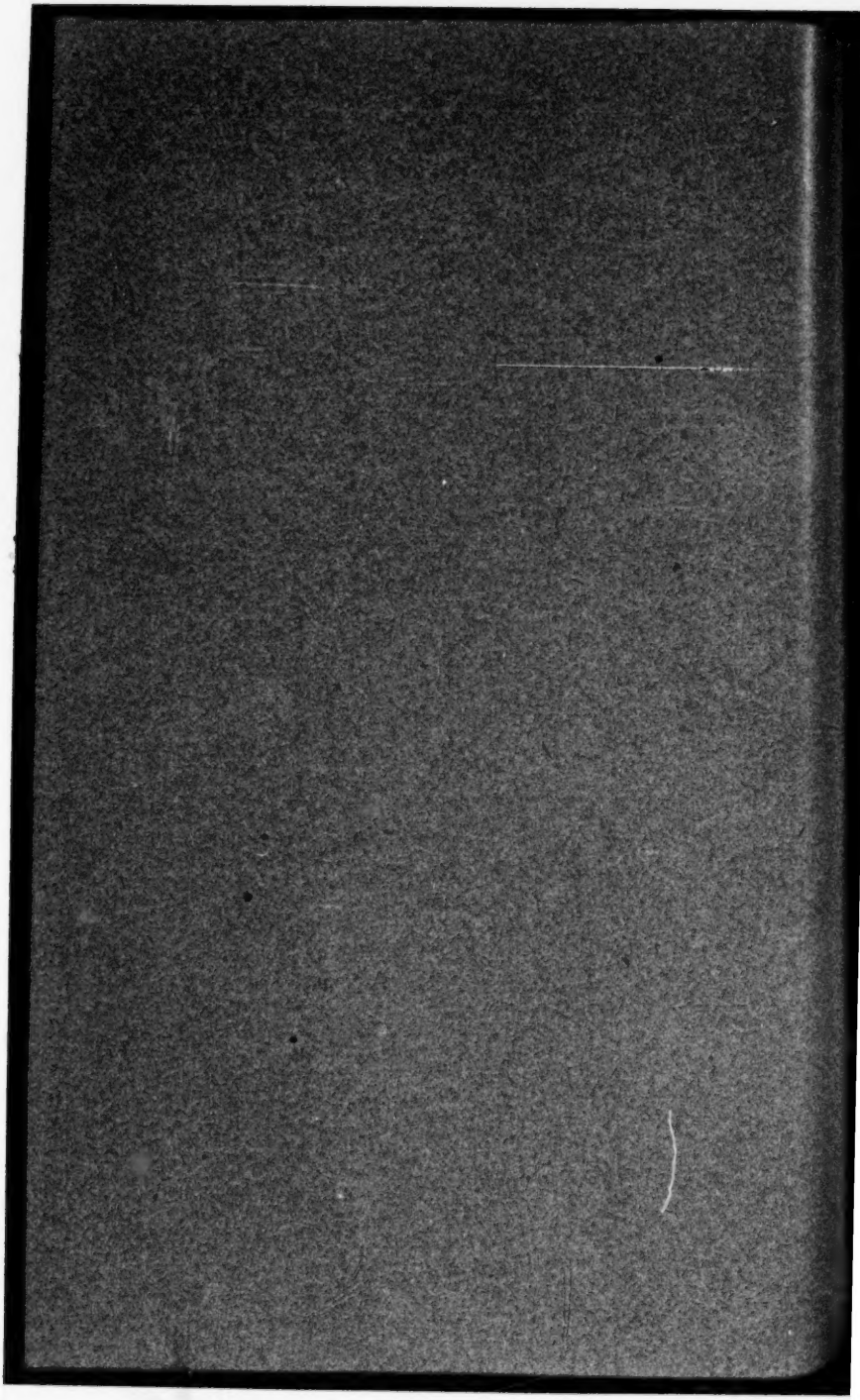
APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLANT.

C. C. FLANSBURG,

Counsel for Appellant.

GEO. NORTH & CO., PRINTERS AND STATIONERS, LINCOLN, NEB.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1897.

No. 151.

AMBROSE P. S. STUART, *Appellant*,
vs.
KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA, *Appellee.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

C. C. FLANSBURG, *Counsel for Appellant.*
G. M. LAMBERTSON, F. M. HALL, AMASA COBB, AND A. E. HARVEY, *Counsel for Appellee.*

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

About the year 1886 the Capital National Bank organized at the city of Lincoln, Nebraska, and appellant, Ambrose P. S. Stuart, was elected a director thereof, and from that time until about the 17th day December, 1892, he con-

tinued at all times to be a director of said bank. He was, during said time, a member of the finance committee, and owned and had standing in his name on the books of said bank 150 shares of the capital stock of said bank of the par value of $100 per share.

During the time he was such director he gave but little attention to the affairs of the said bank, except to examine occasionally and in casual way, when in the bank, the "interest received" account book, which was always at hand where it might be readily inspected. As a member of the finance committee he occasionally, probably twice a year, examined the bills receivable of the bank, or such of them as were placed in his hands, for the purpose of ascertaining whether they were good and collectible bills. If any appeared to him objectionable, he at once took them to officers of the bank active in its management, the president and cashier, who explained away whatever objection was raised against them, and made them appear satisfactory to him.

On December 17, 1892, and for a long time prior thereto, Augustus T. Gruetter and Chas. F. Joers were engaged in the mercantile business in the city of Lincoln, Nebraska, under the firm name of Gruetter & Joers, and on the 17th day of December, 1892, they had a stock of merchandise aggregating in value the sum of about $32,000, and owned a business building incumbered by a mortgage of $30,000, but were at that time solvent and able to pay their debts, and were doing a prosperous business, were in a flourishing financial condition and entirely solvent.

Somewhere about the 12th of December, 1892, W. C. Crooks, a real estate broker of Lincoln, came to appellant at his home, as a representative and on behalf of said Gruetter & Joers, and undertook to pursuade the said appellant, Stuart, to purchase of the said Gruetter & Joers the building heretofore mentioned, a certain brick block on 13th street, in said city, described more particularly as lots D, E, & F, of Baldwin's subdivision of lots Nos. 5 and 6, in block No. 39, according to the original recorded plat of the town, now city of Lincoln, Nebraska, and represented to the said Stuart that it would be a very fine investment. The price asked was $67,500. Stuart, not having sufficient money to make the purchase, at once so advised said Crooks, the agent for said Gruetter & Joers, whereupon said Crooks replied that there was a $30,000 mortgage upon the premises, together with some accrued interest and taxes, and suggested that, as Stuart had $15,000 stock in the Capital National Bank, he should turn this in as so much cash on the trade. After considerable urging on the part of said Crooks, continued over a period of from one week to ten days, and insisting that it was an excellent investment and would yield a large return, appellant Stuart stated to said Crooks that he did not care to part with his stock in the bank, as he believed that, too, was a good investment, for it had paid good dividends in the past and he believed it would again; also that he had at one time been offered $1.25 on the dollar for this stock, and if Gruetter & Joers would take the stock at that price, and the mortgage, interest, and taxes upon their property were deducted, he could probably raise the balance of the price in cash, and if the title was satisfactory he would make the trade. The inducements to make this trade and

turn over the bank stock all came to appellant Stuart from Gruetter & Joers through their agent Crooks, and at a time when he, said appellant, had no thought, desire, or intention of parting with said stock. After the trade was first suggested, and before its consummation, Gruetter & Joers looked up the condition of the bank, went to the cashier and made special inquiries as to the value of the stock, and were informed by the cashier of the bank that the stock was good, that the bank was all right, and the stock was worth whatever anybody would pay for it, but that he did not think there was any for sale.

Thereupon, and after such examination, Crooks, as agent of Gruetter & Joers, advised and informed appellant Stuart that Gruetter & Joers would take the stock at $120 per share, and appellant Stuart, finally consenting and agreeing to turn said stock in on said trade at $120 per share, on December 17, 1892, gave to said Crooks a check upon the said Capital National Bank for $1,000, to bind the bargain, the trade to be consummated on the terms previously proposed if the title proved satisfactory.

Afterwards appellant Stuart, in company with said Crooks, called at the place of business of the said Gruetter & Joers and had some conversation with them, in which he gave it as his opinion that the bank was solvent. He further stated to them that the bank was hard up; that they would probably not pay any dividend in January because, as Mosher, the president of the bank, had informed him, a considerable portion of the bank's money was tied up in real estate; how much he did not at that time say, but he thought that as soon as the real estate was sold the bank

would be returning its former dividends, and if a dividend was paid on the succeeding January, appellant wanted it paid to him. There was some wrangling over the dividends, but finally appellant Stuart consented to permit Gruetter & Joers to receive same, if any were declared by the board in January following.

It is also in proof that Mosher, the president of the bank, was reputed to be very wealthy, a shrewd financier, a good manager, and a successful banker. The appellant Stuart had the utmost confidence in both Mosher, the president, and Outcalt, the cashier, and trusted them with the affairs of the bank, and believed that the bank was making money, being himself an old man and engaged in other matters that claimed his attention.

At the time of making this trade between appellant Stuart and Gruetter & Joers, the bank was in fact insolvent, although it was not known to be so by appellant Stuart, nor could he have discovered it by an examination of the books of said bank, as they were so manipulated and falsified that the bank's true condition did not appear. And on the 22d day of December, 1892, the appellees, Gruetter & Joers, together with their wives, completed the agreement and bargain of their agent, W. C. Crooks, formally agreed upon on December 17, 1892, and transferred to appellant Stuart the real estate above described, at the agreed price of $67,500, in consideration for which they received on said day the 150 shares of stock in the Capital National Bank, owned by said appellant Stuart at $120 per share, the agreed price, making a total of $18,000 as the price for said stock. They also received $19,500 in certificates of deposit and

checks, in addition to the $1,000 previously paid by a check drawn on said Capital National Bank, and $9,000 of this balance was certificates of deposit on the Capital National Bank in favor of Stuart and duly endorsed to Gruetter & Joers, and by them presented for payment, and the cash was received thereon the same day said stock was transferred to them by said appellant Stuart.

There was written in the deed transferring said property to appellant Stuart, a clause and agreement by which he assumed and agreed to pay off and discharge the mortgage of $30,000 upon said building, together with the unpaid interest and the taxes. At the time said appellant Stuart delivered the certifieates of deposit for $19,500 to said Gruetter & Joers, he had remaining on deposit, subject to check, in said Capital National Bank, about $2,500, which was still there when the bank closed its doors. But all his money in the other banks named was used by him in this transaction.

In order to induce the appellant to make this trade, it was represented by Gruetter & Joers that they were able to pay and would pay for the rental of said building the sum of $6,000 per annum, payable monthly, in installments of $500 at the beginning of each and every month; and in accordance therewith they executed a lease of said premises for a period of ten years, at said annual rental, which lease was delivered to said appellant Stuart at the same time together with the said deed, but the rent has not been paid, and was, at the trial of this case, altogether in arrears.

Upon the back of the certificates of said shares of stock

was the usual blank power of attorney, which was duly executed by the appellant, Stuart, at the time he delivered the said shares to the said appellees, Gruetter & Joers, and the said appellees, Gruetter & Joers, presented the certificates representing said 150 shares of capital stock of the said Capital National Bank to the cashier of said bank about the 2d day of January, 1893, and with the blank power of attorney upon the back duly filled, and caused the same to be entered and transferred upon the books of the said bank, and new certificates for said shares to be issued to themselves and in their name. And said 150 shares of stock were so issued to said Gruetter & Joers, and entered in and stood upon the books of said bank in their name, and said bank was then in operation, and continued so to be until about the 23d day of January, 1893, when the comptroller of the currency of the United States became and was satisfied of the insolvency of said bank, and ordered the same closed.

On or about the 6th day of February, 1893, after due examination of the affairs of said bank, one John D. Macfarland was, by the comptroller of the United States currency, duly appointed receiver of said Capital National Bank, and qualified as such receiver, and entered upon the duties of such office, and took possession of the bank, its books, records, papers, documents, and assets, and proceeded to close up the affairs of said association, and so continued until about the 4th day of May, 1893, when he resigned, and Kent K. Hayden was appointed receiver of the said Capital National Bank, and he, on or about the 31st day of May, 1893, qualified as such receiver of said bank and entered upon the duties of such office.

That on or about the 10th day of June, 1893, the comptroller of the currency of the United States at the city of Washington made and published his order of and under that date, by which he declared that the assets of said bank were insufficient to pay and meet the liabilities of the bank, and that it had become necessary to enforce the individual liability of the stockholders, and by virtue of his authority as such comptroller he did thereby make such assessment and requisition upon the shareholders of said Capital National Bank of Lincoln, Nebraska, for $300,000 (being full amount of the capital stock) to be paid on or before the 10th day of July, 1893, and upon his proclamation he made demand upon each and every one of them for the sum of $100 upon each and every share of the capital stock of said association held or owned by them, and authorized Kent K. Hayden, receiver, by all necessary proceedings, by suit or otherwise, to enforce to that extent the individual liabilities of all said shareholders.

That afterwards, on the 11th day of August, 1893, the said Kent K. Hayden, receiver of the said Capital National Bank, filed his bill in equity, in the Circuit Court of the United States for the district of Nebraska, reciting and alleging the organization of the bank, the appointment of himself as receiver, the order of the comptroller of the United States to the appellant, Ambrose P. S. Stuart, and alleging that the transfer of the said 150 shares of the capital stock of the said Capital National Bank upon the books of said association, made on the 3d day of January, 1893, were in fact fraudulent, were colorable only, were made with full knowledge on the part of the appellant Stuart that

the bank was insolvent; that he, personally, as well as officially, knew of the insolvency of said bank, and in order to escape his liability transferred the said stock to Gruetter & Joers, an insolvent firm, who were pecuniarily irresponsible and unable to respond in damages; and on the 21st day of February, 1894, filed an amended bill against Ambrose P. S. Stuart, Augustus T. Gruetter and Charles F. Joers, partners as Gruetter & Joers, setting up substantially the same facts as in his original bill, setting up that the transfer to Gruetter & Joers was made in bad faith, in anticipation of the early insolvency of the bank, and to escape the liability of the said appellant, Stuart, as the holder and owner of 150 shares of the capital stock of the said association, charging and alleging the insolvency of Gruetter & Joers, the transferee, the parties in whose names the said stock stood on the books of the said association, asking that the said transfer be declared to be fraudulent and void as to the receiver and creditors of the bank, that the same should be set aside and held for naught, that the court order and decree the legal title to said bank shares to be in appellant, Ambrose P. S. Stuart, that he be required, compelled, and decreed by the court to pay the full assessment of one hundred cents on the dollar on each share of the said stock so decreed by the court to belong to him, and that the co-respondents, Gruetter & Joers, be decreed and declared by the court to have no interest therein.

The appellant, Ambrose P. S. Stuart, in due course, filed his answer to the said bill, in which he set up substantially the facts as hereinbefore stated, the consideration for said transfer, that the same was made in good faith, that he did

not know of the insolvency of the said bank, that he did not know of the insolvency of the said Gruetter & Joers, that in truth and fact they were not insolvent, that the receiver had made no attempt or effort to recover the amount of said assessment from Gruetter & Joers, that the said Gruetter & Joers were claiming and insisting by legal proceedings then pending that the transfer was in good faith and that it was for full value; asking that the said bill be dismissed as to appellant, and that the said Gruetter & Joers be compelled to pay the said assessment.

Gruetter & Joers, in due course, on or about the 20th day of March, 1894, filed a pleading termed a cross bill, in which they alleged substantially the facts hereinbefore set forth, reciting that the said Ambrose P. S. Stuart knew of the insolvency of said bank, and fraudulently, and for the purpose of cheating, defrauding, and deceiving them, misrepresented and warranted the stock to be of the value of $120 a share; that he knew at said time it was not of that value, or of any value, and that it was worthless, and that he did it with the intent to cheat and deceive the said Gruetter & Joers. There is also an allegation that the said Gruetter & Joers called upon the bank officials, and were advised by them that the said stock was good; that they relied upon said statement by said cashier, and the fraudulent representations of value made to them by the appellant, Stuart, and were induced thereby to trade for the said stock; that they also relied upon the published statements of the bank, made and signed by the directors, of the condition of the bank (none of which were signed by appellant Stuart) and so relying upon the published statements of the bank, and the

statements of the cashier and of appellant Stuart, that the stock was of the value of $125 per share, and that the bank was in a solvent and prosperous condition, were induced to make the trade. They prayed that the petition of the receiver be granted; that the shares of stock standing in the name of Gruetter & Joers upon the books of said bank be decreed to be the property of, and the legal title thereto to be in, appellant Stuart; that he be required and compelled to pay the sum of $15,000, the amount of the assessment thereon, directed and assessed by the comptroller, upon all owners of stock, and that he make a full restitution of the $18,000, the price at which said stock had been taken and received by the said Gruetter & Joers in the said trade as a part of the consideration of said building. There was no tender or offer to return the $19,500 in cash, nor to return the bank stock, nor was there any attempt to procure from the said Stuart, appellant, a deed to the property, to them, nor did they attempt in any way to place the said appellant in *statu quo*. But their action merely was one to escape the personal liability by reason of the ownership of said stock, and to recover the amount of damages which they had sustained.

It appears on the face of the cross bill that Gruetter & Joers are both residents of the city of Lincoln in the state of Nebraska, and their co-respondent, Ambrose P. S. Stuart, is also a resident of the city of Lincoln and state of Nebraska.

Appellant Stuart interposed a demurrer to the jurisdiction of the court on this cross-action, which was overruled.

Subsequently thereto an answer was filed by the said Stuart, alleging and pleading that the trade was made in good faith, for a full consideration; that he had made no warranties whatever; that he had merely expressed an opinion as to the value of the stock; that he, in fact, did not know the condition of the bank, but supposed it to be solvent; that they had never tendered back to him, nor offered to repay him, what he had paid to them in the transaction, and also alleging and pleading the beginning of a suit in attachment and for damages, by the said Gruetter & Joers, in the district court of Lancaster county, Nebraska, for deceit in said exchange, which was then pending and undetermined, and alleging that, by said suit, said Gruetter & Joers had affirmed the validity of the contract, and that they could not now come into equity and ask to rescind or have restitution.

Replication was filed to both the answer of Stuart to the bill and cross bill, and trial was had, resulting in a decree granting the prayer of complainants' bill. It has not been shown in the testimony, nor was it claimed, that Stuart, appellant, had any actual knowledge of the insolvency of the bank, but knowledge was imputed to him by reason of his official position in connection with the said bank.

The decree found that Stuart was a director, and that he knew the bank was insolvent. There was no finding as to whether Gruetter & Joers were solvent or insolvent. There was a finding that appellant had transferred the stock with a fraudulent intention to cheat and defraud the creditors of said bank, and the decree and finding that the said Stuart was the owner of the said 150 shares of stock,

and ordering that he, as the legal owner, pay into court the sum of $15,000, as assessed by the comptroller against all holders and owners of stock, together with 7 per cent interest from the time the assessment was made, and granting to Gruetter & Joers $18,000 damages, together with 7 per cent interest from the 23d day of January, 1893, the date when said sale was consummated and said bank stock turned over. From this finding and decree the appellant prosecuted appeal to the United States Circuit Court of Appeals for the Eighth Circuit. On the hearing in that court the decree below was reversed but without costs, and the court below instructed to enter a decree to the effect that the transfer of said shares was fraudulent and voidable as to receiver Hayden, appellee, and ordering a recovery against him on said assessment and costs thereof, that Gruetter & Joers were entitled to no relief under their supposed cross bill, and that the same be dismissed, and awarding Stuart, appellant, costs against them. From that finding and decree this appeal is prosecuted.

ASSIGNMENTS OF ERROR.

First—The court erred in holding the said appellant Stuart liable simply because he was a director and ought to have known, when, in fact, he had no actual notice of the condition of said bank.

Second—The court erred in rendering judgment for the receiver, and holding the appellant Stuart liable on said assessment levied by the comptroller.

Third—The court erred in holding that said transfer was

fraudulent, and made on behalf of said Stuart with the intent and for the purpose of escaping his statutory liability.

Fourth—The court erred in holding that the said transfer was voidable as to the bank after it had found that the transferees were solvent at the time of the transfer.

Fifth—The court erred in reversing the case and ordering a decree to be entered against Ambrose P. S. Stuart, thus and thereby making a new contract for the parties.

Sixth—The court erred in holding that said transfer was voidable as to the bank, after it had expressly found that the transfer was valid as to the transferees, and that they had, by affirmative action, confirmed the validity of said transfer.

Seventh—The court erred in not directing the receiver to collect from Gruetter & Joers, the transferees, the amount of the assessment, it appearing that they were, at the time of the bringing of the suit, possessed of large amounts of personal property, more than sufficient to pay the assessment levied by the comptroller; and it also appearing that Gruetter & Joers, the transferees, with full knowledge of all the facts, had confirmed the validity of the transfer.

Eighth—The court erred in not awarding to the appellant, Stuart, his costs in reversing the decree of the court below, the circuit court having held that the transfer was void as to the bank, having ordered a transfer of the shares of the stock to be entered upon the books of the bank in the name of Ambrose P. S. Stuart, when, in fact, at the most, said transfer was only voidable, and the court had no jurisdic-

tion to award the entering of said transfer upon the books of the bank; and this decree being erroneous, and so found by the circuit court upon a reversal thereof, appellant should recover his costs.

ARGUMENT.

I.

When a director of a national bank has in fact no knowledge of its insolvency, will the law impute to him such knowledge in order to render fraudulent and void a transfer of his stock made upon full consideration to a third party, solvent at the time of such transfer?

This question covered by the first assignment of error made by appellant is answered by the court below in the affirmative, and is one of the grounds of complaint upon which reversal of this case is sought.

It was claimed by appellee that the transfer of his stock by appellant Stuart was void as to the bank, the creditors of the bank, and himself as their representative, as such transfer was made with the fraudulent intent and purpose on the part of appellant Stuart of escaping his statutory liability to respond to an assessment, and that whether ap pellant Stuart had actual notice of its insolvent condition or not was immaterial, because of the fact that he was a director, and chargeable with everything that the books of the bank would have disclosed; and that, inasmuch as the bank was in fact insolvent, he could not transfer his stock to any person without remaining liable to answer to an assessment on the transferred stock.

The greater portion of the testimony taken simply shows the condition of the bank at or about the time of its suspension, but does not in anywise tend to prove knowledge on the part of appellant Stuart as to its condition. The receiver, appellee, testifies that the bank was in a bad condition; insolvent for a very long period of time, so far as the books of the bank show; but in order to discover their true condition it would have been necessary to *go through all the books of the bank* (record, 128); and among other things he takes up the certificate of deposit account and attempts to prove that this ought to have been notice to the directors and every person of the exact condition of the bank, and says (record, 128, 129) that the books did not show the *true* condition, and there were more certificates outstanding than the books disclosed, and that the bank kept a certificate register, stubs of all certificates, and a certificate account, but this latter did not show the *true* condition; that one method of issuing certificates was to make the stub for a small amount, the certificate for a large amount, and to make the register agree with the stub itself in amount. In some cases the stubs and records would not agree, and the certificate register would be marked in many instances "paid," but that, as a usual thing, the certificate of deposit register tallied with, so far as the amount was concerned, the stub of the certificate, and that there was no way of detecting the *actual* amount of the certificate *until it was returned or presented for payment;* that they kept a certificate of deposit account in the ledger, but he *does not know* from what place the entries in that account were taken to form the debits and credits, and that the books themselves *would not have disclosed* the true condition

of the certificate of deposit account (record, 130), and that the discrepancy between this account, *as shown by the books*, and the *actual* certificates which were returned and those outstanding was $356,649.49, which have been allowed against the bank by the receiver, and in addition one for $150,000 (which had not been allowed) making a total of $506,649.49 not shown by, and in excess of, the book account (record, 130); that he does not know, and has no idea of, the amount of excess certificates of deposit *actually* issued, because he does not know that *all* the stubs *could be found*, and if they were he would have to find all *returned* and *paid* certificates, deduct the paid certificates from the total, as shown by the stubs, and even *then* it would *not show the true state* of the account, as the certificate register was balanced by the word "paid" being put opposite certificates which really were *not* paid, thus reducing the apparent number of certificates outstanding in quite an amount.

Again, in regard to detecting the discrepancies in the other accounts, this witness says it would have taken someone familiar with the banking business to know *where* to go to detect the discrepancy (record, 131).

Taking up the item $46,000 of stock and bonds as assets, he testifies that the bank owned none at that time. In answer to question by counsel as to how he could tell from Mosher's bookkeeping whether they had any or not, he replied:

"Because he eliminated the account by a false entry; it is possible that they *may* have had the stocks and bonds,

but if they did Mosher appropriated them to his own use" (record, 131–132).

Again, as to manipulating the interest paid account (record, 133), he shows that this is an account that never could have a credit under any condition, and so he says an examination of this would have shown the *false credits* before spoken of, and an examination of the bills receivable would have shown bad debt.

But does the law require a search for credits where none could appear? And this is the sole testimony upon which they charge appellant with knowledge, the records upon which they impute to him notice, records so manipulated, falsified, and changed that even the expert accountant in charge, who at the time of taking his testimony had been in possession of these books for eighteen months, a banker by profession and training for twenty-three years (record, 120), himself confesses that he cannot tell from the careful, critical examination that he has given to these accounts, what became of the $46,000 of bonds—whether they were really *appropriated* or whether the *entry was a false one.* And so with the certificate of deposit and other accounts. The whole thing, he said, "was manipulated by Mosher" (record, 130).

On the other hand is the testimony of appellant Stuart, who says:

"I never saw or examined the interest paid account, never saw the book until the bank failed. The interest received book was lying right in sight, and that was the reason I looked at that" (record, 49).

And again (record, 49) he says that he never examined the books at all, at any time, and that the only book he ever looked into besides the interest received account was the ledger occasionally to see what his balance was. He says he trusted the affairs of the bank to the managing officers, and relied on their fidelity; that he was not a bookkeeper and could not have told anything about the books by an examination (record, 38). If the testimony of the receiver is true, the books themselves, even if examined by him, would not have given him any knowledge of the truth.

He says again (record, 45):

"I had confidence in the managers of the bank. I supposed they would not declare a dividend unless there were proceeds enough to justify declaring a dividend,"

And that he never examined to see whether there was any manipulation of those books at all, as he did not think there was any occasion for it. He had the utmost confidence in the parties managing the bank. He says (record, 60):

"I had, to sum it all up in a word, the utmost confidence in Mosher and Outcalt. I thought he was as straight as a string in his business transactions. There was nothing to excite my suspicions at all."

To further show this confidence, it is his testimony that, the time of the transaction with Gruetter & Joers, he drew out all the money he had in the Industrial Savings Bank, that he sold his stock in the Union Savings Bank to raise money (record, 81, 82), with both of which institutions he was connected, to be used in that transaction, and drew

the balance necessary out of the Capital National Bank, and left $2,500 remaining, and (record, 82) it was in there "when the bank failed" (record, 60).

Again, in reply to counsel on cross-examination as to his being uneasy, he says (record, 62):

"No; you say uneasy; I was not uneasy. I had the utmost confidence, I have said again and again, in the management of the bank—in Mosher—and I thought that when Mosher's name was put on the back of a note it was gilt edge; it could not be any better."

Speaking of the $2,500 left in the Capital National, and his confidence, he says (record, 82):

"There was not any of it drawn out—more put in—that is to say, I tried to make a deposit the very Saturday that the bank closed (it did not open Monday) but I did not get to the bank quite soon enough to get the deposit in."

Now if these things are true as testified to by receiver Hayden, appellee, that there was more than $500,000 of excessive certificates of deposit not shown by the books, how could a director be expected to know this fact, when the receiver himself says he could not tell until they were all in, and his own evidence shows that those certificates were outstanding, and are still, $350,000 of them and a little more having been allowed by him, and the other $150,000 not having been allowed.

Again, the $500,000 in certificates of deposit (record, 128–129), together with the $108,000 borrowed by Mosher and Outcalt after appellant Stuart sold out and the stock was transferred, would have been alone sufficient to wreck the

bank, and render it insolvent, being more than double the capital stock of the bank, and that, too, without in any possible way conveying notice to the most diligent director.

As to the bad paper which was in the bank, appellant Stuart (record, 40) testifies that the business of making the loans was left to the managing officers (the cashier and president); that if he, as one of the finance committee, found any paper that he did not think good, when examining the bank securities, he called the attention of the president and cashier to it, and that they always gave him a sufficient explanation to overcome the objections (record, 40); and, with these satisfactory explanations (record, 83), nothing further was done, but the paper was passed. As to the really bad paper, to which appellee, the receiver, testifies, appellant Stuart says that *he never saw any of that paper at any time during the period that he was a director or a member of the finance committee*, as they kept that out of the way (record, 50–82). He never had the definite amount of the aggregate bills receivable, and (record, 43–52) he never knew of any bad debts, but supposed that certain loans (called to his attention by council) were all right, as he had been so informed (record, 83); that he never suspected it until after the bank failed. He never did run over the bills receivable to add them up, and never demanded a list to be made out, but he simply passed upon the paper that was presented to him.

This, it seems to me, will show that there was no *actual* knowledge on the part of appellant, nor were the books in such condition that he ought to be chargeable with notice of their contents. They must bring home to him actual notice or participation in the fraud.

In the case at bar an attempt was made to show that appellant Stuart had reason to believe that the capital of the bank was not intact, and that he had so stated; but, so far as appears, he had no reason to suspect this and did not so state. What he did say was (record, 35) that a portion of it was locked up in real estate (so Mosher, the president, informed him), and for this reason no dividends would be paid probably until it was sold, and that then the stock would be a good, paying property again. He had no reason to suspect that any officer of the bank had practiced, or was practicing, any fraud upon the bank or the public. He was not a managing officer, simply a director, and being such, and having no actual knowledge, the real condition of the bank could not be imputed to him.

It is the contention of the appellant that he is not liable merely because he might have acquired, when in fact he had no actual knowledge of the bank's condition. The decree below can only be justified upon the ground of knowledge, and this must be clearly and conclusively established. It cannot be based upon imputed knowledge, which, in fact, appellant did not possess.

Experience has shown that no judicial tribunal can safely assume the existance of fraud, and the law never presumes it. Nor will the law impute a dishonest or fraudulent motive to a person in any given transaction if his conduct is consistent with honesty and fair dealing. Neither will a court impute to or charge a person with knowledge of facts which, if actually known by him, would have made his conduct fraudulent, but the absence of which knowledge leaves him to act in good faith, simply because

of the fact that from his position he might, upon inquiry, have learned, but does not in fact know to exist; and then, from the knowledge so imputed, declare his conduct to be fraudulent and dishonest. In other words, the law does not necessarily imply or impute actual knowledge as the basis of fraudulent conduct to one who did not, in fact, know, simply because he had at hand the means that would, if then employed, have given him that knowledge.

Fraud is intentional; its perpetration is secret; its execution simply the culmination of an unlawful or dishonest design and contrivance. Intent alone does not constitute fraud. It is the intent executed in the act that makes it. Now to say that a man ought to have knowledge of a thing, and then that, as he ought to have known it, the law will presume he did, then that, inasmuch as the law presumes him to have had knowledge, he must be held in fact to have it, hence he has in fact the knowledge which he ought to have had, and, consequently, any act must be with such knowledge, hence fraudulent, would, it seems to me, be simply a new method of presuming the existence of fraud based upon imputed knowledge.

The question, then, may be narrowed down to this inquiry: Should the appellant, because he was a director, have examined the discount register, the certificate of deposit register, and the books of the bank? Was it his duty to know their contents and condition, and is there any penalty for not doing this?

The rule laid down by this court does not require a director to make any such examination, unless he becomes

acquainted with some fact calculated to arouse suspicion, even in a case where a direct suit is brought against him as director, for the failure to perform and discharge his duty.

In the case of *Briggs vs. Spaulding*, 141 U. S., 132, the liability of directors, says this court, "depends upon whether they should have made an examination of the books and assets of the bank," and then holds that they were not required to do this, quoting with approval from the *Hallmarks* case, 9 Ch. Div., 332, the language of Sir George Jessel, as follows:

"I know no case, except *ex parte* Brown, 19 Beav., 97, which shows that it is the duty of a director to look at the entries in any of the books, and it would be extending the doctrine of constructive notice far beyond that of any other case to impute to this director the knowledge which it is sought to impute to him in this case."

In the case of *Cowley vs. Smyth*, 46 N. J. Law, 380, in a direct suit against a director, the court held that where the plaintiff came to him suggesting that there was a rumor circulating affecting the condition of the bank, and expressed a desire to withdraw his money, and the defendant thereupon replied that he was a director of the bank, on the finance committee, and it could not be possible that the bank was in an unsound condition, that he knew it was solvent, that they had a surplus of $6,000 after the dividends were paid, the court refused to impute knowledge, but held that it was a question of fact for the jury, to say whether the defendant made the representations for the fraudulent purpose to deceive, or whether he made them believing they were true. In other words, it was a question of fact to be determined by the jury.

In the case of *Swentzel vs. Penn. Bank*, 147 Pa. St., 140, the facts were that the president, with the knowledge of the cashier, and co-operation of some of the clerks, had withdrawn the funds, emptied its vaults, and squandered its assets in gigantic oil speculations. The question was whether the directors "ought to have known of these transactions," and whether their failure to know what the real plunderer was doing was such negligence on their part as to render them liable to the creditors of the bank. And this is the statement made by Mr. Justice Paxon, in writing the opinion of the court, answering that question:

"It is not alleged—it has never been alleged—that the hands of these directors are stained by fraud. The bank was wrecked by its president, with its cashier and some of the clerks aiding and abetting. It was adroitly done, so far as the means were concerned, and it was concealed wholly from the directors. False entries were made in the books, and false accounts, or accounts with fictitious persons, were opened so as to hide the theft. The report of the bank's condition, made by the president to the directors from time to time, showed it to be in good condition, while in point of fact it was honey-combed with fraud, and its assets squandered in wild speculation. Nor do we think the directors were bound to regard the statements submitted to them as false, and the president, cashier, and clerks as thieves. They had nothing to arouse suspicion. All of these gentlemen stood high; they were trusted agents of the corporation, paid for their services, and regarded in the community in which they lived as honest men. Aside from this, the directors were among the heaviest stockholders of the bank. They collectively owned a large proportion of it."

In *Wakeman vs. Dalley*, 51 N. Y., 32, it is said:

"As he was a director, must we impute to him, for the purpose of charging him with fraud, a knowledge of all the affairs of the company? If the law requires this, then the position of a director in any large corporation, like a railroad or banking or insurance company is one of constant peril. The affairs of such a company are generally of a necessity entrusted to its managing officers. The directors generally cannot know, and have not the abilty or knowledge requisite to learn by their own efforts, the true condition of the affairs of the company. They select agents in whom they have confidence, and largely trust to them. And if the directors, when actually cognizant of no fraud, are to be made liable in an action for fraud, for any error or misstatement in such statements and reports, then we have a rule by which every director is made liable for any fraud that may be committed upon the company in the abstraction of its assets and diminution of its capital by any of its agents, and he becomes substantially an insurer of their fidelity. It has not been generally understood that such a responsibility rested upon the directors of corporations, and I know of no principle of law or rule of public policy which requires that it should."

To the same effect see,

Arthur vs. Griswold, 55 N. Y., 400–406.
Morgan vs. Skiddy, 62 N. Y., 519–522.
Scott vs. Depeyster, 1st Ed. Ch., 541.

These authorities clearly measure the liability of a director, and appellant contends that in no event, under them, would he be liable to the receiver, or any other person, because he was a director, as knowledge of the bank's condition would not be imputed to him by reason of the position which he held.

II.

If the court shall hold that the law *will* impute knowledge whether appellant in fact knew, or if from the evidence the court shall find there was *actual knowledge*, yet this is insufficient to warrant affirmance of the judgment below.

Three facts appellant contends must exist and be established by the evidence, before there can be any liability on his part to respond to an assessment upon the shares of the stock. First, knowledge on his part of the insolvent condition of the bank; second, a consequent intent on his part to escape the statutory liability; third, the financial irresponsibility of the transferee, and inability on his part to respond to the assessment. Without these three concurring facts there is no liability on the part of the appellant. If there was in fact no knowledge on the part of appellant and the transfer was for full consideration, there is no liability. If there was no knowledge, then there could have been no intent to escape the liability. If the transferee was solvent and able to respond at the moment of the transfer, had an assessment then been made, the *knowledge* of appellant and the *intent* with which he transferred are alike immaterial. It is upon the ground, and the sole ground, of the fraudulent intent and purpose of appellant that the decree and finding of the court below must be sustained.

This brings us to a consideration of the second, third, and fourth assignments of error, which for convenience may be considered together, and which complain of the action of the court in rendering Stuart liable on the assessment, in holding that the stock transfer was fraudulent and made by

Stuart with the intent to escape the statutory liability, and that the same was voidable as to the bank, although the transferees were solvent at the time of the transfer.

Neither the bank nor its representative, the receiver, can select its debtor. If the transferee of stock was solvent and able to respond to an assessment made at the moment of the transfer, the transferrer is dischared, whatever may have been his purpose in making it.

This, then, is the record upon which the court below based its decree. A national bank organized in 1885, with a paid up capital of $300,000; appellant, seventy-five ye ars of age, a retired professor of chemistry, owning $15,000 of its stock, and serving as a director from its organization; no experience whatever in banking, and no knowledge of bookkeeping; unable to examine the affairs and books of the bank himself; the president and cashier respected and honored by the community, of unquestioned integrity, reputed wealthy, and that wealth increasing; rumors reaching appellant as to some losses incurred, but assurances by these managing officers that real estate security ample to satisfy the bank's claims was held by it; a semi-annual dividend duly and regularly declared during the existence of the bank; a statement of the president to appellant that because of the real estate taken by the bank on debt, the semi-annual dividend of January, 1893, might not be paid; a business firm of large experience and extensive trade seeking to purchase appellant's stock in the bank, soliciting him to exchange it for a building owned by them, offering 20 per cent premium for the stock, agreeing to rent the build-

ing at an annual rental of $6,000 for a period of ten years, and finally transferring the building to appellant at an expressed consideration of $67,500, subject to a $30,000 mortgage, which appellant assumed and agreed to pay; the bank stock received at $120 on the share, and the balance $19,500 in cash paid to transferees at the time of the delivery of the stock; $10,300 of this cash drawn from the bank, leaving on deposit $2,500 more, and an attempt to make a further deposit the very day the bank closed its doors; the balance of the cash used in the transaction drawn from other intistutions, and being all appellant's cash therein; this exchange and transfer about thirty days before the bank closed; $19,500 in *cash* put into *real estate and title taken to appellant;* the day the bank closed its doors suit brought by the transferees against appellant to recover damages on account of the worthlessness of the stock, thus affirming the validity of the transfer and sale of the shares of stock to transferees; an assessment made by the comptroller of 100 per cent on the stock of the bank five months after the bank failed; no attempt to enforce the statutory liability against the transferees, who held the legal title as shown by the books of the bank.

In order to determine the validity of the transfer and consequent title, we must look to (*a*) the circumstances of the transaction; (*b*) the apparent purpose of the parties in making it; (*c*) the financial responsibility of the transferees.

A.

SURROUNDING CIRCUMSTANCES.

How was the transfer made?

Crooks testifies (record, 84):

"I had this block for sale; knew that Professor Stuart had some idle money; went to see him to sell block. He said he didn't have money enough at first conversation; talked about the amount of money and price of block. First asked $70,000. Agreed finally on $67,500 later on. Don't know whether first or second time I called asked him if he couldn't put something else in if he didn't have enough money. I mentioned the bank stock. He said he didn't care to put that in, thought it was good property. He wanted one and a quarter for it. I went away and saw Gruetter & Joers. They decided to take the bank stock if they could get it for what it was worth. We figured back and forth for one or two days; finally decided to take it at $120 (record, 85). Appellent then paid $1,000 down, which I gave to Gruetter & Joers, and they signed contract, and papers were delivered. I represented Gruetter & Joers, and authorized by them."

A. T. Gruetter, one of the transferees, says (record, 143):

"Made trade December 17, 1892. Deed turned over a week later; sold building $67,500 subject to mortgage $30,000, assumed by appellent; received $19,500 cash, and $15,000 bank stock, taken at $18,000 (record, 143). Book value of First National Bank stock was about $1.40, and Capital National Bank was about $1.10; knew First National stock sold at $1.60, and Capital National being valued at $1.10, thought $1.20 would be a fair value; executed a lease to him for ten years, annual rental of $6,000 (record, 144). If there was any dividend in January appellant wanted it. We did not agree to that. We had quite a conversation about it, and claimed if we paid $1.20 for the stock, we should have the dividends. We paid agent's commission (record, 145)" (record 148, cross examinations). Crooks first suggested the idea of making a trade of that building to Professor Stuart several weeks before December 17. We had been having a talk several times, and I made in-

quiry in regard to the stock before the 17th day of December and as to the condition of the bank."

Stuart says (record, 31):

"Crooks called and wanted me to buy the block. I answered I could not, that I was not prepared; didn't have enough money, and supposed that would end the matter, but he seemed to think I could buy it, and said what it could be had for, $67,500, with $30,000 mortgage. I said I didn't have that amount of money, and didn't see how I could make the trade. Finally the bank stock was suggested, and I said if they chose to take it,—I wasn't particular about selling—but if they did, I could (record, 32) raise enough cash, by assuming the mortgage, to take the block. Crooks came from six to ten times, and it was talked over (record, 33). I told them I had been offered twenty-five cents premium, but had concluded at the time Crooks offered not to sell, because it yielded me more than I thought I could get for money elsewhere. Part of consideration was they were to lease building for ten years, $6,000 a year. They were successful merchants, thought them solvent. They received $19,500 cash, and had a large furniture stock (record, 34); it was as honest a trade as I ever made.

The other transferee, Joers, simply corroborated the other witness, and this is the trade alleged to be in bad faith and fraudulent as to the bank.

Here, then, are the circumstances.

The trade was sought by transferees, and their agent first suggested taking the bank stock. The stock was taken, after investigation by transferees, at twenty per cent premium. The payment by appellant of $19,500 cash at delivery of the stock; the building leased for ten years at $6,000 a year to induce appellant to trade; the January dividend claimed

by both parties; the stock surrendered to transferees, and new certificates issued by the bank to them, and recorded in bank books. The money, $19,500 used by appellant was made up of all the money held by appellant in other banks, and only the balance necessary checked out of the Capital National; the $2,500 balance left on deposit with Capital National Bank, and was still there when the bank closed its doors.

The mere statement of these facts ought to show the good faith of this transaction, without any argument to support it. But appellee contends that because the bank had been plundered and was then insolvent, appellant could not act in good faith in transferring his stock. It is true that the bank president was dishonest and the bank honeycombed with his frauds; that while reputed a man of large wealth and financial power, his means were in fact limited and disappearing in private speculations. All his dishonest practices and fraudulent schemes, however, were covered and concealed by his method of manipulating books, by his suppression of truth and suggestion of falsehoods.

Only after its doors were closed and expert investigation had turned its light upon it, did the mutilated and plundered corporation appear in its reality. But while such was the fact, it would be manifestly unfair to judge appellant or his intent and motive in the light of what is *now* known of the president's character, and his methods and conduct of the bank's affairs. It is true appellant trusted him, but at that time nothing had ever occurred to shake that trust and confidence, to arouse suspicion, or put appellant upon inquiry.

B.

MOTIVE AND INTENTION.

Certain it is that every circumstance indicates good faith. Here was appellant with over $20,000 in cash, more than half of it in this bank. Appellee's theory is that appellant was trying to get away from the liability of responding to an assessment which he had reason to apprehend would be made, and this was a contrivance to cheat the bank. Would any man take $20,000 in cash which he might easily shuffle out of sight at any moment, and exchange it for real estate, taking the title thereto in his own name, if such was his motive and purpose? Would he have asked a large premium on his stock and insisted on the January dividend if there was on his part such great anxiety to be rid of it? Did appellant believe the transferrees insolvent when he had just paid them $19,500 cash, and entered into a written lease of the building with them by which they promised to pay him $6,000 a year rental for a period of ten years? Would any person, to escape a $15,000 liability, pay over $19,500 in cash, and with the apprehension of bank failure leave $2,500 on deposit in that bank until it closed its doors? These questions answer themselves, and show conclusively the lack of any sinister or fraudulent motive on the part of appellant to escape his liability. On the other hand Gruetter & Joers solicited, urged, and consummated the trade. They wanted cash for the building. They took part cash, part bank stock. In order to make the trade they executed a lease for ten years at $6,000 a year. Is this an evidence of fraud on the part of appellant? There can, it seems to me, be no doubt of the good faith of

this entire transaction, and by it the legal title to the stock passed to Gruetter & Joers, and thereby they succeeded to all "rights and liabilities" of the former owner. Their liability to respond to an assessment was complete the moment they took the title. And their liability being fixed, the only question is one of their financial ability to respond. If at the moment of the transfer they were able to meet an assessment, then not only their subsequent insolvency, but the intent and purpose with which the stock was taken are alike immaterial, and the transferrer is absolved from liability to the bank or its receiver, whatever his purpose in making it, and his intent only becomes material when the transfer is to one wholly irresponsible, or where it is merely colorable, or not an "out and out" transfer.

Not only do the facts surrounding the transfer show a *bona fide* sale to Gruetter & Joers, but their action for damages because of deceit in representing its value was a direct affirmance of the title to the stock in themselves, and confirmed the validity of the transfer. They might have rescinded and escaped liability. They, however, elected to retain the stock, and recover damages.

C.

FINANCIAL RESPONSIBILITY OF TRANSFEREES.

Were the transferees able to respond to an assessment? The court below found that transferees were solvent at the time of the transfer, but were rendered insolvent by it, or by the subsequent assessment, which the court found they were unable to pay. The record discloses their condition. Gruetter says (record, 150):

"Solvent before trade and could have paid debts; received $19,500 cash; bought stock at $18,000; our liability $15,000; appellant assumed $30,000; had $30,000 or $40,000 more liabilities besides the mortgage (record, 150); merchandise a little over $30,000; $32,000 in merchandise afterwards paid into the corporation; corporation got benefit of the $19,500; on December 17, 1892, transferees solvent if not disturbed and (record, 152) if not liable for this $15,000 assessment, then could pay out, but if called on to pay it, busted right away."

Following is a statement of Gruetter & Joers' financial condition at the time of the transfer (record, 154):

ASSETS.

Building	$67,500	
Stock of furniture	32,000	
		$99,500
Appellant rec'd bld'g	67,500	
Reducing assets to		$32,000
Appellant pays cash	19,500	
Increasing assets to		$51,500

LIABILITIES.

To First National Bank	$20,000	
To Crooks, agent	1,000	
To merchants	15,000	
To Louie Meyer	7,500	
To security debt	5,000	
To mortgage on building	30,000	
		$78,500
Appellant assumed mortg.	30,000	
Reducing liabilities to		$48,500

So that, aside from the bank stock, the firm was then solvent, its assets being $3,000 more than its liabilities, besides notes and books of account referred to but the amount not shown. What, then, is the result of this trade upon the solvency of the firm?

Appellee contends that the title to the stock was by the transfer placed in Gruetter & Joers, and that by the said transfer the transferees were rendered insolvent because of the assessment laid on said stock consequent upon such ownership, and because of the liability of transferees to respond to the call of the comptroller for an assessment.

Appellant contends that actionable fraud in behalf of the receiver only exists when he is unable to compel payment from the transferee; that fraud against the bank can only be predicated upon knowledge on the part of appellant of the bank's financial weakness and insolvency, or in information possessed by him, showing there was good ground of apprehending the failure of the bank, and a consequent stock assessment impending in the near future; and that the transfer of stock was made with the intent, first, of relieving the transferrer of the liability, and, second, of cheating the bank by the substitution of an irresponsible party as a stockholder, unable to respond to and meet the liability. It is the knowledge of the bank's condition, or the information upon which he grounds his apprehension, that shows his fraudulent intent and purpose. If there is in fact no such knowledge or information, then there is no such intent, because one cannot intend to escape a liability of which he does not know and has no reason to apprehend; and an intent to escape the liability, even with such knowledge, in-

formation, or apprehension of stock assessment is not sufficient to constitute fraud against the bank, unless the stockholder combines and colludes with some irresponsible transferee for the purpose of substituting such transferee in his stead. If the transferee could respond, or if the claim could be made out of him, then there is no fraud on the bank, as the assessment laid on the stock could be enforced.

On December 22, 1892, this stock was transferred to Gruetter & Joers, and on January 23, 1893, the bank closed and transferees began a suit at law upon said day against appellant, alleging that the stock was worthless and known to be so by appellant when transferred, that his representations of its value were false, and actually known by him to be so, and made by him for the purpose of cheating them; that because of such fraud and misrepresentations as to the value of said stock, they were entitled to $18,000 damages.

If the representations and conduct of appellant are as alleged and constitute a fraud, it was a fraud upon the transferees, and was available as such as a basis for relief in an action at law by them seeking damages. If the transfer of stock to them rendered them unable to pay the assessment, the liability of appellant to them for fraud (if any existed as alleged) would furnish the means of full payment to the receiver. If the transferees succeed in their action for damages, it at once rendered them able to respond and liquidate the assessment. It would then be the duty of the receiver, and he must recover the assessment from them. They having the ability to pay, there would be no injury to the bank, and consequently no fraud of which it could complain, and the receiver could look to no one else.

If, on the other hand, Gruetter & Joers failed with their case against appellant for damages, it could only be because the court would find that the trade and transfer of the stock was *bona fide*, without collusion, and that appellant had no actual knowledge of the bank's condition, and was possessed of no information showing that there was any ground to apprehend the failure of the bank. By rescission and tendering back the stock and money received, they might have escaped the liability, but by their election to seek compensation in damages at law they voluntarily chose to retain the stock, thereby affirming the validity of the transfer, and placing indisputably the title to the stock and all liability of stock ownership in themselves; and the action of Gruetter & Joers in bringing such suit for damages upon the discovery of the fraud (if any existed) would conclude not only themselves but the receiver as well.

Appellant contends that the receiver could not, by an independent action, brought long after, and during the pendency of the damage suit, undertake to set aside the transfer of the stock as to the bank, on the very ground on which transferees affirmed the validity of the transfer, asserted title in themselves, and sought damages for deceit.

Suppose, for argument, the transaction is fraudulent. Then Gruetter & Joers will recover in their suit. They are then able to pay. Suppose the receiver, in his suit to annul the transfer and recover the assessment of applicant because of transferee's inability to pay, also succeeds. Suppose the judgment of transferees is then collected of appellant for the full value of the stock, the legal title to which is in them. Suppose the receiver collects of appellant the full

amount of the stock assessment, although appellant is not the owner, and the legal title to the stock is in another. Suppose the assets of the bank, considered worthless, subsequently become collectible and pay ont all liabilities, leaving 25 per cent for the stockholders. The title to the stock remains in Gruetter & Joers, and they therefore receive the distributive share as stockholders. The appellant, who has paid the value of the stock to Gruetter & Joers and the stock assessment to the receiver, has lost his right, but retains his liability as a stockholder of the bank, while the rights and advantages to a distributive share going to the stockholders are received by the very parties who have alleged the worthlessness of the stock.

Again, suppose Gruetter & Joers were insolvent at the time of the transfer, but succeeded in their suit, and could then pay the assessment. Would not the receiver be compelled to look to them as the legal owners of the stock? And this would be so, not because they had become able to pay, but simply because they had realized upon one of their assets.

Or again, suppose Gruetter & Joers had loaned money and taken notes therefor, aggregating $18,000, and suits were pending against parties able to pay for the recovery of said amounts, when an assessment was made. Would it have been any reason for bringing suit against appellant because they were forced to sue to reduce their assets to possession, or resort to court to realize them? Or would it do to say that in determining the solvency or insolvency of that firm, these suits should be entirely excluded from consideration?

Suppose Gruetter & Joers had a million dollars in government bonds; that the same had been embezzled by their bookkeeper, and that at the time of the assessment, suit was pending to recover the possession of these securities, under which they were taken into the custody of the law; and that if they failed to succeed in that suit they would have no means of paying the assessment. Would it be fair to refuse to consider the suit as an asset of the firm, or to reject the probable results of it in estimating their financial responsibility?

It seems to me that the suit pending against appellant to recover damages can be considered an asset, and, if so, the transferees are abundantly able to pay. They are not insolvent, and the receiver must look to them. If they succeed in their suit it is because fraud exists. If they fail, it is because of the absence of fraud. And if the transfer was made in good faith, without notice and intent to escape the liability, then the receiver has no cause of complaint, simply because the transferee may be pecuniarily irresponsible.

III.

The complaint of appellant in his fifth, sixth, and seventh assignments of error is to the holding of the court by which he is declared to be personally liable for the assessment, and transferees are absolved therefrom, notwithstanding the validity of such transfer between the parties to it.

The ability of transferees to respond must be determined at the moment of the transfer, not at a subsequent period, under different conditions.

The position of appellee is certainly an anomalous one. At the time of the transfer the bank was still in operation, the transferees were doing a large business, and continued so to do. The assessment was levied by the comptroller in July, 1893, but its call could not affect the solvency and standing of Gruetter & Joers *unless it was enforced* by the comptroller *against their firm*. So that this condition existed: the transfer was made to a firm admitted to be solvent, and which is still solvent, and will continue so to be unless the comptroller enforces the statutory liability against them. If the action is maintainable against appellant, it can only be upon the ground of the insolvency of Gruetter & Joers. Yet if appellant is compelled to pay this assessment, the transferees will remain solvent and able to pay their obligations, and the anomaly of the position is that the receiver maintains his action on the ground of pecuniary irresponsibility on their part, when in fact, by bringing this action against appellant, it leaves transferees solvent and able to meet all their obligations.

In the opinion, the court of appeals says (record, 230):

"The transfer of stock in a failing bank to one who for any reason is unable to respond as promptly and effectually as he was to the liability their ownership imposes, commits a fraud upon the creditors of the bank, renders his transfer voidable at their election, and leaves himself subject to the individual liability imposed by the ownership of the stock, if the creditors elect to pursue him."

Appellant contends that this is not the law; first, the purpose of the parties to the transfer is not taken into consideration. Insolvency of transferee is immaterial if unknown and otherwise transaction is *bona fide*, and, second, the liability of transferrer or transferee to respond is not to be determined by the promptness or the ease with which the assessment may be made from the one or the other. This would give the bank a right to *select* that party who could easiest pay, and then because of such selection, fix and enforce the liability, when by section 5139 of the Revised Statutes it is provided that the transferee "shall succeed to all the rights and liabilities of the former holder." And appellant contends that, inasmuch as transferee, by virtue of this statute, assumes to pay any assessment if made, and inasmuch as this statute is the basis of all liability, it is immaterial whether transferrer is worth many times over the amount transferee is or not, if transferee is at all able to respond. For if he is so able then transferrer is absolved because the "present holder has succeeded to the liability" to answer the assessment.

Appellant insists that the authorities cited by the court of appeals do not support the principle it announces.

In *Germania National Bank vs. Case*, 99 U. S., 628, the facts were that the owner of the stock, the Germania National Bank, transferred it to Wm. A. Waldo, one of the bank's clerks, and it continued to stand in his name. He acquired by the transfer no beneficial interest in the stock, and *there was an understanding between him and the officers of the bank that he should re-transfer it at their request.* And on the examination the cashier of the bank *admitted* that

one reason the transfer was made was to avoid liability as a stockholder. The court in this case says:

"While the evidence establishes that the Crescent City was in a failing condition when the transfer to Waldo was made, and leaves no reasonable doubt that the Germania National knew it, and made the transfer to escape responsibility, it establishes much more. The transfer was not an out-and-out transfer. The stock remained the property of the transferrer. Waldo was bound to re-transfer it when requested, and all the privileges and possible benefits of ownership continued to belong to the bank. No case holds that such a transfer relieves the transferrer from his liability as a stockholder."

But the court held, and so states the rule to be, that if the transfer was out-and-out, and in good faith, and not colorable only, the transferees were released from liability, although in that case the bank was unquestionably in a failing condition, while in the case at bar it was apparently flourishing, and so considered by all parties; and appellant contends that that principle applied to his case will discharge him.

Peters vs. Bain, 133 U. S., 670, was a suit in equity begun by the receiver of the National Bank of Norfolk to set aside an assignment made by the firm of Bain & Brother for the benefit of creditors, and to subject the assignment property to the payment of debts due the bank, and to charge property in the hands of the assignees with a trust in favor of the bank. It was insisted that the capital stock was a trust fund, of which the directors were the trustees, and that the creditors had a lien upon it in equity, and that this applied as well to the liability upon the stock of the National Bank;

hence no general assignment of property for the payment of debts could lawfully be made by a shareholder. The court says:

"Undoubtedly unpaid subscriptions to stock are assets, and have frequently been treated by courts of equity as if impressed with the trust *sub modo* in a sense that neither stockholders nor the corporation can misappropriate such subscriptions so far as creditors are concerned. Richardson vs. Green, 133 U. S., 30–44. Creditors have the same right to look to them as to anyone else, and the same right to insist upon their payment as upon the payment of any other debt due to the corporation. The shareholder cannot transfer his shares when the corportion is failing, or manipulate a release therefrom for the purpose of escaping his liability. And the principal is the same where the shares are paid up, and the shareholder is responsible in respect thereof to the equal additional amount. There was, however, no attempt to avoid this liability here."

Consequently whatever the court may have said as to transferring shares was not within the case, and simply dictum.

Boden vs. Johnson, 107 U. S., 251, cited by the court was one of the chief causes relied upon at the bar. The facts were that Johnson owned 130 shares of stock, and transferred them to Mrs. B. Valentine on the books of the bank. Mrs. Valentine was *known* by Johnson at the time to be insolvent. The court, stating the circumstances, divides the case into two branches for its consideration. *First*, whether Johnson had *information as to the condition* of the bank, and, *second*, the *real nature of the transaction* between himself and his transferee. The bank was in a straitened condition; the president was anxious to make a loan on its real estate, and wrote to a former presi-

dent to assist him, who replied that he had a friend (Johnson) who was able to make the loan, and would do so. In November, 1873, Johnson went to Norfolk with Cole, when the president advised him that the need of the loan was urgent, the security was good, and he appealed to him as a stockholder to make the loan. Johnson promised to look into the affairs and make it if possible; $25,000 was the amount asked. Whether Johnson examined the books and papers of the bank or not the president did not remember, but the cashier testified that upon Johnson's visit the book keeper took into the president's room while Johnson was there a statement prepared by him showing the condition of the bank. A few days after his return from Norfolk Johnson wrote to the president, on December 5, 1873, declining to make the loan, and notifying him that he had transferred his stock to Mrs. B. Valentine, enclosed the certificates, with the power of attorney, asked to have the same transferred on the books, and the certificates sent to her at Belleville, Essex county, N. J. There was some correspondence and refusal to transfer the stock, but finally the transfer was made, on the 15th day of January, 1874. On February 14, 1874, the president wrote Johnson that the certificate had not been forwarded to Mrs. Valentine, and enclosed it to him, asking him to hand it to her, telling him again that the affairs of the bank were in a critical condition. Johnson himself did not testify, but Mrs. Valentine testified that her deceased daughter was Johnson's wife; Johnson had no children; her daughter died in 1864; she came from California where she resided in 1865 or 1866, and went to live at Johnson's house in New Jersey; she was divorced from her husband, but he was not dead that

she knew of; Johnson was to pay her $1,000 a year for her services; she preferred the bank stock to money. She said she had been with him some six years; no agreement as to the compensation until 1871. She allowed Johnson fifty cents on the dollar for the stock, as that was the price the president of the bank had offered for it at the time Johnson transferred to her. She does not know who suggested the taking of the stock. The first she knew of it was when he came back from Norfolk and proposed to her to take the stock. She had no property or other means to purchase the stock, except the alleged indebtedness for annual services. She told Johnson that he might consider her jewelry as part of the consideration, but he did not accept it. She had no other bank account, stocks, or bonds, and all the money she had was pocket money.

Under the facts Johnson was held to have had *actual knowledge of the insolvency of the bank*, having been appealed to to tide it over. To *escape the liability* he *transferred to a person known by him to be irresponsible*, at *fifty cents* on the dollar. In that case the court announces this rule:

"Where the transferrer *possessed the information* showing that there is good ground to apprehend the failure of the bank, colludes and combines, as in this case, with an irresponsible transferee with the design of substituting the latter in his place, and by thus leaving no one with *any* ability to respond for the individual liability imposed by the statute in respect of the shares of stock transferred, the transaction will be decreed to be a fraud on the creditors, and he will be held to the same liability to the creditors as before the transfer. He will be still regarded as a shareholder *quoad* the creditors, although he may be able to

show that there was a full or a partial consideration for the transfer as between him and the transferee."

In the case at bar there was no actual notice nor information upon which to ground an apprehension of either failure or assessment. The stock sold at a premium, and *more cash paid to transferees at the time of the transfer than the entire amount of the assessment.*

In the case last above the doctrine is announced that the transferee must not be "one without *any* ability to respond to an assessment." The rule of the court of appeals declares that it is a fraud if transferee is "unable to respond as *promptly* and effectually," as was the transferrer. Appellant insists that it is the ability to respond, and not the promptness of the response, that is the essential point to be determined.

In the case of *Richmond vs. Irons*, 121 U. S., 27–56, cited by counsel at the bar, the facts were that the bank became insolvent and suspended payment September 23, 1873. Holmes, transferee, was president of the bank and an admitted insolvent, and paid for the stock with promissory notes, made payable to his order, but which were of little value. The stock was transferred on the books of the bank, part of it on the day it failed and part the day thereafter. And the court held that in that case it was made *with actual knowledge and in contemplation* of the bank's insolvency.

The doctrine of all the cases is that in order to avoid a transfer in an action brought by the receiver, it must necessarily appear (*a*), that the transfer was not an out-and-out

one, on full consideration and in good faith; or (*b*) *first*, that there was actual knowledge of the bank's insolvency, or information possessed by transferrer showing good ground to apprehend its failure; *second*, combination and collusion with some person to receive the stock known to be financially irresponsible: *third*, a design to escape the stock liability; *fourth*, to cheat the bank out of the collection of its assessment, by leaving the stock in one apparently insolvent and unable to pay, or known to be so. Appellant contends that these essential facts must appear, and that the inability to respond must exist at the moment of the transfer, and not when the assessment is made. The irresponsibility of the transferee, in order to constitute a fraud, must appear at the time of the transfer. For fraud consists not in seeking to escape the liability, but in substituting in the place of the transferrer some one unable to respond, and thus cheating the bank out of its assessment. The fraud consists in the injury to the bank, and it will not do to judge of the motives of the transferrer in the light of what is subsequently known, when in fact transferrer had no knowledge or means of knowledge of those facts.

The transaction in the case at bar differs entirely from any reported case in all its essential features. At the moment of the transfer to Gruetter & Joers they had a stock of furniture estimated by them at $32,000. They received $19,500 cash. They were apparently doing a flourishing business, so that at the moment of the transfer they had in cash and personal property $51,500, with a possible liability by reason of the bank assessment of $15,000. Appellant knew of no other indebtedness, nor did he have reason to

believe that any such existed. The solvency of transferees was apparently beyond dispute. It could not be said that they were irresponsible transferees within the meaning of the above decisions. Not only were they apparently solvent, but they are in fact so, if any regard is given to the action instituted by them against appellant on January 23, 1893, if the allegations upon which said suit is based are true, for if appellant was guilty of fraud they could recover. At the time of the transfer there was no liability on anyone to respond, for no assessment was made until long subsequent thereto. The assets of the bank might have paid out the creditors and depositors in full. In that event no assessment would have been made, and no liability would have arisen against either transferrer or transferees.

Suppose the suit by Gruetter & Joers against appellant had been pushed to trial, and the payment of the judgment enforced prior to July, 1893. Would it be seriously contended for a moment that the transferrer would be liable to the bank, and if so, upon what principle? Suppose the judgment had been actually paid by appellant, and that when the subsequent assessment was made, transferees, for the purpose of escaping their liability, had converted all their property into money and shuffled it out of sight, and refused to pay the assessment. Can it be true that the decision of the court below is correct upon principle, and that the bank has the right to collect the money of the party that can easiest pay it? It is said by the court of appeals record, 233):

"The question was not, therefore, whether the transferees

were solvent or insolvent at the time of the transfer, but whether or not the individual liability of the transferees was as available as that of the transferrer. If it was not, the creditors were damaged, and the fraud was actionable. The evidence leaves this question without doubt. Stuart was solvent and amply able to pay the $15,000 in full and at once. Gruetter & Joers were solvent before but insolvent and unable to pay the liability after the transfer."

This certainly cannot state the law, for by it the question is whether the individual liability of transferees was as available as that of the transferrer. It is not a question of availability at all. Transferees might, as we have shown, have had their property in cash and shuffled it out of sight, so that in no event would it be available in an action brought by the receiver. Nor is it a question of whether the liability is at all available at the time of the bringing of the suit. The question is, What was the ability of the transferees to respond when the transfer was made?

Suppose in the case at bar that appellant had only been possessed of the bank stock and $19,500. Suppose that Gruetter & Joers had been possessed of large means at the moment of the transfer, but in speculation or loss by fire they had become unable to pay when the assessment was made, so that their individual liability would not be at all available to the receiver. Could the receiver then look to appellant or his equity in the building? Suppose, again, that the transferees had been men of large means at the time of the transfer; that appellant had been without means, except the cash and the bank stock. Suppose the assessments, instead of coming in seven months, had not come for two years, and in the meantime Gruetter & Joers

had become insolvent and worthless, and the appellant had, by inheritance or otherwise, become possessed of large means. The individual liability of Gruetter & Joers would not be at all available to the receiver, but that of the appellant would. Can it be true, as announced by the Circuit Court of Appeals, that the question is not one of solvency or insolvency, but whether the individual liability of the transferees is as available as that of the transferrer? The question is one of availability, expediency, or ease of payment. For if Gruetter & Joers, the transferees, were able at the moment of the transfer, then the transferrer is absolved. To hold that the question is whether the individual liability of transferee is as available as that of the transferrer would give the bank the right of selection, which was never intended by the framers of the act. It would practically compel and require the transferrer to see to it that his transferees' liability not only was, but continued to be, as available in an action brought by the receiver as his own. If a man was worth $100,000, owning shares of stock in a national bank, it would be essential to him to see to it that the man to whom he transferred was not only worth as much, but that his individual liability was as available. Or if the resources of the transferrer were all cash, so that he could immediately pay if an assessment was made, he would be compelled to transfer to somebody with a sufficient amount of cash, of equal availability and readiness to respond. And not only that, but it would practically make of every transferrer a guarantor of that continuing availability. The statute creating the liability intended that it should cease on a *bona fide* transfer of stock. And if the transfer is so made, mere financial in-

ability of transferee does not leave transferrer liable. Stock assessment is an incident of stock ownership, but ability to meet that assessment is not a test of stock title; and whenever between parties the title to the stock has passed from one to the other, for full value, it is conclusively in that other for all purposes as to all the world.

The title having passed to transferees, the stock liability was theirs, and appellant was absolved therefrom. To affirm this cause this court must find that under the circumstances of the stock transfer, it was as to the bank fraudulent and of no effect. To reach this conclusion the court must close its eyes to the situation and conduct of the parties. All the circumstances usually present in a fraudulent transfer are wanting.

Here are the facts. Negotiations to sell the building instituted by transferees, appellant declaring he cannot buy; stock suggested by transferees, appellant declining to part with it; urgent solicitation by transferees, appellant demanding a premium; stock taken at 20 per cent premium by transferees, appellant paying them in addition $19,500 cash; stock entered on the books by transferees, appellant taking title to real estate in his own name; agreement to rent the building by transferees, appellant making ten year lease, $6,000 per year; furniture stock of $32,000 owned by transferees; appellant leaving $2,500 on deposit in the bank until its failure.

Can it be said that from these facts there was any bad faith? There was no collusion, no combination. The transfer was out-and-out. Appellant had no thought or

desire to part with his stock until transferees suggested; no thought of the bank's failure or impending assessment could have been in the minds of either party under these undisputed facts. Everything shows the transfer to have been in the best of faith, and it cannot be annulled by the receiver in this independent action. He must look to Gruetter & Joers for the assessment, and recover from them. They are admittedly liable, and have no defense. Out of the abundant assets in their possession the claim of the bank ought to have been made long ago, and diligence and endeavor would have given the receiver his money from them. In any aspect of the case, the decree below is wrong, and cannot be sustained upon either reason or authority. The cause should be reversed, with instructions to dismiss the bill.

C. C. FLANSBURG,
Counsel for Appellant.

November 15, 1897.

No. 160.

NOV 29 1
JAMES H. McKEN

Brief of Flansburg for Appellee

Filed Nov. 29, 1897.

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 160.

AUGUSTUS T. GRUETTER & CHARLES F. JOERS,
Appellants,

vs.

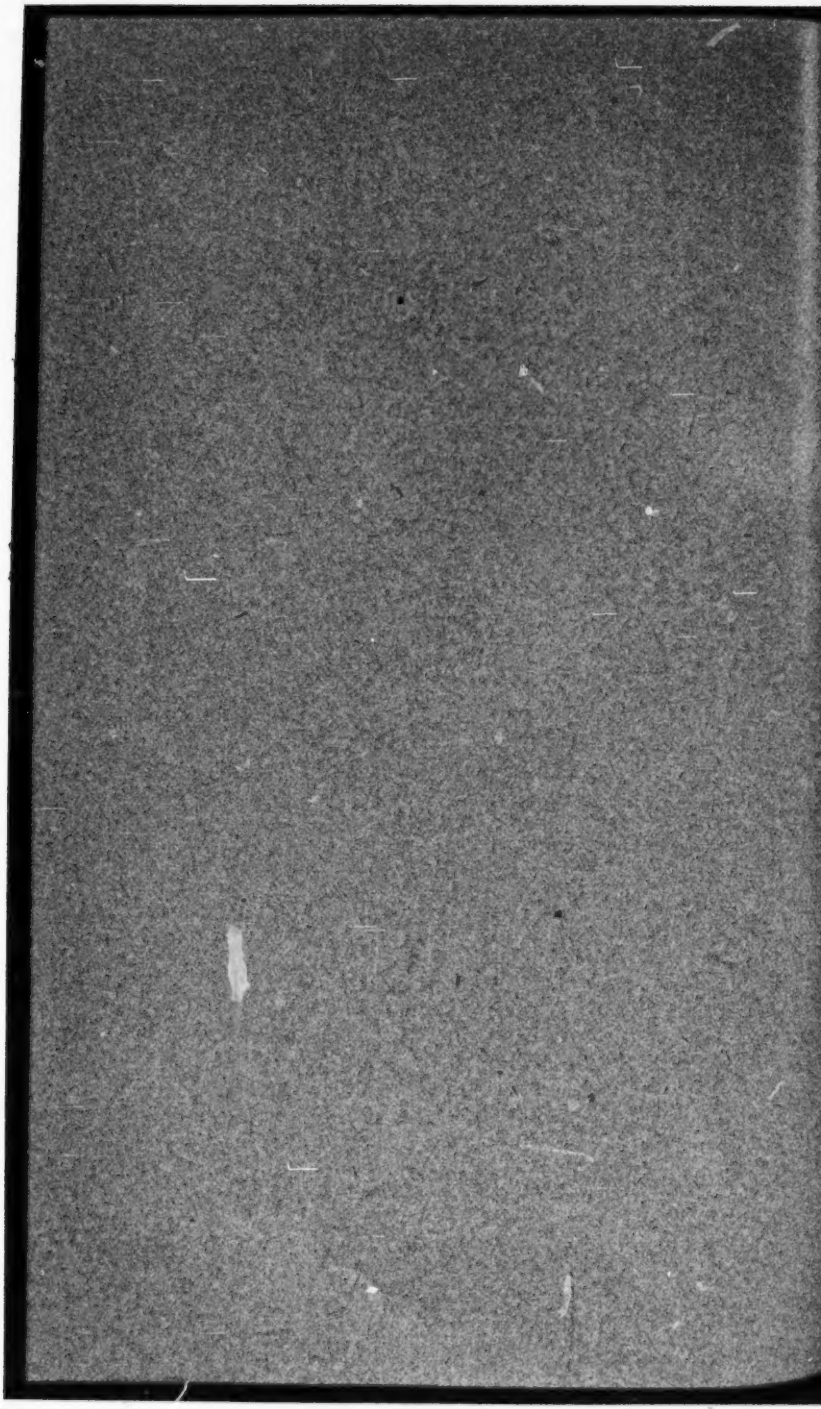
A. P. S. STUART AND KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLEE.

C. C. FLANSBURG,
Counsel for Appellee, A. P. S. Stuart.

JACOB NORTH & CO., PRINTERS AND STATIONERS, LINCOLN, NEB.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 160.

AUGUSTUS T. GRUETTER AND CHARLES F. JOERS,
Appellants,

vs.

A. P. S. STUART AND KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA,
Appellees.

APPEAL FROM THE U. S. CIRCUIT COURT APPEALS 8TH CIRCUIT.

ARGUMENT.

The court of appeals denied to Gruetter & Joers the relief sought by them in this suit on two grounds: *first*, because the facts therein would not entitle them to relief at the hands of a court of equity; *second*, that the pleading filed by them was not a cross bill.

By the petition filed in the district court of Lancaster county, Nebraska, on January 23, 1893 (record, 89) the cause of action stated was that Ambrose P. S. Stuart falsely and fraudulently, and for the purpose and with the intent to cheat and defraud plaintiffs (Gruetter & Joers), represented and stated to the said Gruetter & Joers that the

said Stuart well knew the condition of the bank and the value of said shares of stock, and the said stock was fairly and reasonably worth the sum of $125 per share, or $18,000 in full; that plaintiffs were then about to sell their real estate, and did sell the same to the defendant at an agreed price of $37,500, subject to an encumbrance of $30,000, and received from the defendants an assignment of said stock as and for the sum of $18,000, as part of said purchase price; that the bank was, prior to January 23, 1893, insolvent, and at the time of making said representations by the said Stuart, and at the time of the assignment by Stuart of the stock to Gruetter & Joers, the said Stuart well knew that the bank was wholly insolvent and unable to pay its debts, which is followed by a prayer for damages in the sum of $18,000, the value of the stock.

It was the ordinary action of deceit for false warranty or false representations.

Afterwards, and pending this suit, the receiver filed his bill in the circuit court, seeking to recover the assessment from Stuart; and Gruetter & Joers, on February 24, 1894, filed an answer (record, 11) to this bill of the receiver, admitting and confessing all the allegations of the said bill, and joined in asking that relief be granted the receiver as prayed for by him.

Afterwards, and on the 20th day of March, 1894, Gruetter & Joers filed a pleading, termed a *cross bill* (record, 19), in which they sought to compel the payment to them of $18,000 by Stuart, because of alleged fraud on his part in representing the value of said stock. It will appear from

an examination that by the pleading, termed a cross bill, Gruetter & Joers ask that the title to the stock be decreed to be in Stuart; and that he then be required to pay the amount of the assessment, but without any tender of the bank stock nor offer on their part to pay back his cash and place him in the position he was before the contract was made. Nor do they seek title to their own property conveyed to him in exchange for the bank stock and cash.

An action at law for damages on a contract alleged to have been obtained by fraud is inconsistent with a suit in equity for rescission of the same contract; and, as the party injured cannot have both, but must elect between them, if he pursues his legal remedy for damages at law, he affirms the validity of the transfer, and no tender is necessary. If he proceeds in equity for a rescission he must first tender back or offer to return what he has received under the contract.

A party to a contract must accept it in its entirety. He cannot retain the benefits and reject the burdens of it. If any portion of the contract is affirmed, or a claim asserted to any benefit under its terms, then it must be accepted in its entirety. They cannot both affirm and repudiate, or do a part of both. Equity will not permit them to retain so much of the contract as may be advantageous, and reject the balance. If they repudiate it, it must also be in its entirety. If they retain the cash, they must retain the stock as well. They cannot place the title to the stock back in Stuart and retain the $19,500 in cash.

It rested entirely with Gruetter & Joers in the first in-

stance to tender back the stock and the money received, and demand back the property exchanged; or they had the right to retain the stock and seek their remedy in damages for its value.

These remedies are, however, inconsistent. The party who has the right of election must make his choice, for where there are two inconsistent rights presented to the choice of a party, he cannot enjoy both, but must accept or reject one or the other.

Peters vs. Bain, 133 U. S., 670.

He cannot take the benefits under a contract and then repudiate it, as attempted by this cross bill. If rescission is sought, tender must be made. If damages are sought, it affirms the validity of the transfer. The authorities to support this proposition are numerous and uniform.

Garland vs. Bowling, 1 Hempst. (U. S.), 710.
Burnett vs. Stanton, 2 Ala., 181.
Johnson vs. Walker, 25 Ark., 196.
Ellington vs. King, 49 Ill., 449.
Jarrett vs. Morton, 44 Mo., 275.
Manahan vs. Noyes, 52 N. H., 232.
Moore vs. Bare, 11 Ia., 198.
Potter vs. Titcomb, 22 Me., 300.
Handforth vs. Jackson, 150 Mass., 149.
Brown vs. Witter, 10 Ohio, 142.
Stanton vs. Hughes, 97 N. C., 318.
Lane vs. Latimer, 41 Ga., 171.
Doughton vs. Bldg. Assn., 41 N. J. Eq., 556.
Blake vs. Nelson, 29 La. Ann., 245.

Williams vs. Wilson, 1 Dana (Ky.), 157.
Bell vs. Hartman, 9 Phila. (Pa.), 1.
Hammond vs. Buckmaster, 22 Vt., 375.
Masson vs. Bovet, 1 Denio (N. Y.), 69.
Griffiths vs. The Bank, 6 Gill & J. (Md.), 424.
Calhoun vs. Davis, 2 Ind., 532.
Red Jacket vs. Gibson, 70 Cal., 128.
Cooke vs. Rux, 34 Miss., 105.

The validity of the transfer, however, was affirmed by the suit for damages; and having once elected to proceed for damages, they cannot subsequently rescind. Whenever a contract is alleged to have been obtained by fraud and deceit, the party injured has only one of two remedies: an action at law for damages, or suit in equity for rescission. As they are inconsistent he cannot have both, but must elect between the two. He may have his legal relief for damages at law, or his equitable redress by rescission in chancery. He cannot have damages in equity nor rescission at law, and an election by seeking damages in a court of law concludes the party from afterwards seeking rescission.

Moore vs. Noble, 63 Barb., 435; 36 How. Pr., 385.
Pierce vs. Carey, 37 Wis., 232.
Martin vs. Edwards, 11 Hump. (Tenn.), 374.
Hubbell vs. Meigs, 50 N. Y., 487.
Ernsworth vs. Barton, 60 Mo., 511.
Cooper vs. Landon, 102 Mass., 58.

But even if they could rescind, in no event could they do so without tendering back to Stuart the money they received

from him and the bank stock, putting him in the condition he was in before the transfer was made.

Counsel, in argument and discussion of the case at bar, contended that it was unnecessary to tender back anything, but that the action might proceed without such tender or offer to pay, and cited in support thereof the case of *Martin vs. Roberts*, 5 Cushing, 126. But the case is not an authority in point. That was a *common law action in assumpsit.* It did *not seek a rescission*, but simply sought to recover the amount of the damages sustained, the price of the article sold. In that case a certain article had been sold and the vendor had received in payment a promissory note, the maker of which was represented to be solvent, together with an order on a third person for goods, which latter was duly paid. The vendor *returned the note* to the vendee, on discovery of the fraud, and brought a suit in assumpsit for the balance. But clearly that authority is not applicable to a suit in equity. That was a suit for damages. In a case at *law*, the contention of the appellees would be good. We admit that where a thing is worthless it is not necessary to return it. But the $19,500 cash was certainly not worthless; why was it not returned? We say that in equity the vendee upon rescission *must always return or offer to return what he has received*, although the rule at law is different, as we will presently show.

Counsel also cited the case of *Babcock vs. Case*, 61 Penn. St., 427.

In this case Babcock sold certain land and represented that the title was good and that the land was all right, say-

ing that he had examined it. The land was held by Babcock on a tax title, and after he sold it the title based on a tax deed failed and action was brought *in equity* against Babcock to rescind, and the court held that no reconveyance of the land was necessary, because it had been held by Babcock on a tax title which was worthless, and a deed reconveying to Babcock would in effect convey nothing.

The case of *Pierce vs. Wood*, 23 N. H., 519, was also cited by counsel. The facts in that case were that a party had effected a compromise of his debts by fraudulent representations and procured a discharge of the same by paying a per cent thereon. The creditor, discovering the fraud, brought an action *at law in assumpsit* to recover the balance of the amount due, but did not repay or offer to return the per cent which he had received. The court (page 534) says:

"The doctrine of rescission of contracts will hardly apply to a case of this kind. The whole foundation of the plaintiffs' right to recover rested upon the question of fraud. If fraud was made out, then the plaintiff could recover, otherwise not, and the whole trial proceeded upon that ground. Fraud being established, the compromise was void, and the entire debt would be at once revived and a clear right of action existed in his favor. And it appears to us it would be a singular doctrine to hold that before an action can be maintained to recover the balance, that portion of the plaintiff's demand which had been paid must first be refunded, and that before he can institute a suit for the amount out of which he has been defrauded he must first pay back that which, so far as he is concerned, he has honestly received. Such a rule would be offering a premium for fraud, and in most cases of this kind the plaintiff might better retain the per cent which he has received than relinquish that for the uncertainty of recovering the whole."

These authorities have no application at all, we contend, for they were all brought, with the exception of the Pennsylvania case, in a court of law, and affirmed the validity of the contract, but sought damages. In the Pennsylvania case the court held that it was unnecessary to reconvey, as a reconveyance would have been simply a nullity. In cases of this kind, where the action is at law, no return or offer of return is necessary, as, by bringing an action at law, the plaintiff elects to retain the title, but seeks damages for the fraud and misrepresentation.

Here, however, Gruetter & Joers come into a court of equity asking a money judgment and execution by the prayer of their alleged cross bill, although in a court of equity they neither return nor offer to return what they received under the contract which they now seek in part to avoid. If rescission is the object sought, their alleged cross bill must fail for want of equity, because there is no payment back of the money, or offer to return the consideration. If, on the other hand, it is for damages, it is a suit at law, and they have their adequate remedy under the action properly brought for damages for the deceit. Relief in damages is not cognizable, however, in this court of equity.

In *Miller vs. Barber*, 66 N. Y., 564, the supreme court says:

"The action was for relief, and judgment was demanded for damages sustained by the plaintiff. If the action had been brought upon the promise which the law implies against a fraudulent vendor of real or personal property to restore the consideration paid by the vendee, upon his electing to rescind the contract, the plaintiff would have been

bound to aver and prove that upon the discovery of the fraud he had returned or offered to return what he had received upon it; but an action for damages for the deceit is brought consistently with an affirmance of the contract of sale."

In *Cooper vs. Landon*, 102 Mass., 58–60, the supreme court says:

"Accordingly, when a vendor is sued for making statements in respect to the quality of the article sold by him which are not according to truth, if the vendee desires to charge him in tort, he alleges that a *false representation was made* by him, but if he desires to charge him in contract, he alleges a *promise that was broken*. The word "represent" does not import a promise; on the contrary, it gives notice that fraud is alleged, and that the pleader has taken upon him the burden of proving a scienter."

There can be no relief in equity where the plaintiff has a plain, adequate, and complete remedy at law.

In *Sears vs. The City of Boston*, 16 Pick., 357, the court says:

"If he has sustained any damage by failure or non-performance of the contract, it might be fully compensated in damages,"

And hence there is no relief in equity. See also:

Howe vs. Nickerson, 14 Allen, 400–406.

It will be observed that the object of the alleged cross bill is not to avoid the effect of the contract itself in its entirety. In effect the pleading alleges that the contract of exchange between the parties is valid so far as it places the

title to the realty in Stuart, and to that extent it should stand; but that they should be paid $18,000 and interest, which they allege Stuart has failed to pay under the contract, because the bank stock taken at that price has proven worthless. If by their action they seek to *defeat the entire transaction*, before they can do that they must have offered to rescind; they must be willing to do equity if they seek it; they must put us back into the position in which we originally were. Neither can the court make a new contract for us, and require the payment of cash where we had agreed to exchange property. It could not enforce the original contract, for we have fully performed that. It can not give damages for the fraud, as that is the province of the court of law. If the defrauded vendees had sought rescission, that election rested with them. The vendor can not choose.

In the case of *Mills vs. Knapp*, 39 Fed. Rep., 595, Blatchford, Judge, says:

"Besides this, the plaintiff on the face of his bill has a plain, adequate, and complete remedy at law. He declares in his bill that the amount he is entitled to recover is $8,221.16, as of October 12, 1871. He asks for no discovery. He shows that no accounting under the direction of the court is necessary, for he makes the accounting himself in his bill. The prayer that the defendant may 'account for and pay over such amounts and profits,' which he fixes at a specified amount, is no more than the prayer that the defendant pay over such specified amount. No other equitable relief is asked. In such a case it is not necessary that an objection should be taken *in limine* in the answer. It is taken at the hearing, and that is sufficient. This is not a case where it is competent for a court of equity to grant the relief asked."

See also:

The Insurance Co. vs. Stockton, 38 Fed., 378.

But it was contended by the appellants that there is a concurrent jurisdiction in equity in a case of fraud, even where there is a plain, adequate remedy at law. On this point we submit that such is not the rule.

Suter vs. Matthews, 115 Mass., 253–255.
Jones vs. Newhall, 115 Mass., 244–249.

B.

A respondent filing an answer confessing the allegations of the bill is not entitled to file a further pleading in which he seeks to litigate independent controversies with his co-respondents, in which complainant has no interest, and in which no relief is sought against him.

The circuit court of appeals held that the pleading filed by Gruetter & Joers in this case, and denominated by them a cross bill, was not such in fact. The receiver, in his original bill, sought to set aside the transfer of Stuart to Gruetter & Joers, and to collect the assessment from Stuart, upon the stock so transferred, on the ground that he had transferred it to escape his individual liability, and cheat and defraud the bank by substituting Gruetter & Joers, irresponsible stockholders in his stead, all of which Gruetter & Joers by their answer confessed to be true, and joined in asking that the relief for which the original bill prayed should be granted. After having made this answer the court held they could not file an independent pleading terming it

a cross bill, alleging therein the transfer of stock was as to themselves void, because of fraudulent representations made by Stuart to induce them to make the trade, and they were not under it entitled to a decree setting aside the transfer as to them, or entitled to a judgment entered in their favor against Stuart for the amount at which the stock had been received by them in trade. The court below refused to entertain and consider this pleading, on the ground that it was not a cross bill; it was not brought in aid of their defense to the original suit, for they had confessed the allegations of the original bill, and thereby admitted they had no defense. It was not necessary to obtain a complete determination of the controversies between the receiver and Stuart because those issues would be necessarily completely disposed of by the decision upon the bill itself which by their answer stood confessed. Their pleading, although in a measure connected with the general subject of the original bill, interposed a new controversy between co-defendants to the original bill, the decision of which was unnecessary to the complete determination of the controversy between complainant and defendants over the subject matter of the original bill. This made it an original bill, and the court dismissed it because there could not be two original bills in the same cause.

The cross bill attempted to litigate an independent matter between Gruetter & Joers and Stuart and to procure a settlement of the differences and issues between themselves, n no wise connected with the original bill. It only referred to the receiver by admitting that he was appointed as such, but no demand against him was made in their cross bill. The bill brought by the receiver was an equit-

able one, the action set up in the alleged cross bill was purely a legal demand, and respondent is certainly entitled to no relief by way of cross bill, unless it becomes necessary to obtain such relief against complainant and respondents to completely and thoroughly determine the cause made by the complainant in his bill. And this certainly is unnecessary on behalf of the respondent, who has confessed every allegation. The authorities are numerous and uniform to the proposition that a cross bill can never be made the instrument for determining independent matters. The receiver had no interest whatever in this independent controversy between Gruetter & Joers and Stuart. It was a new and several controversy. In the court below it was admitted that the suit for $18,000 was pending in the state court, but it was denied that it was an affirmance of the transfer of the stock, but it was claimed a distinct repudiation of it. In the brief below counsel referring to the suit says:

"Had it not been for the fact developed later that shareholders are liable to an assessment by the comptroller of the currency, that action would have afforded cross complainants a complete remedy, and their recovery upon the above facts cannot be doubted. But the fact of the assessment put an entirely different face upon the matter. It would be a very slight advantage to Gruetter & Joers to recover the $18,000 residue of purchase money, if they should be compelled to pay the receiver $15,000 and interest as an assessment upon the shares of stock."

So that it would appear that the action in the state court was brought in the belief that it furnished a complete remedy. They kept the bank stock. They were satisfied to retain it, but brought their suit in damages for the deceit.

They had no idea at the time that the bank would not pay out. No one expected an assessment. It is clear from this fact that it was not within the contemplation of the parties. After the assessment was made, then the thought of escaping it seems to have been the motive that prompted the filing of this alleged cross bill. They had, however, exercised their election to recover damages. They had deliberately acted, upon the discovery of the fraud, and whether their action would furnish a complete relief or not, they were bound by the consequence of their voluntary act in bringing the action for damages. The matter in this alleged cross bill was not necessary to a defense in the original bill, but was entirely foreign to it. It was in no sense auxiliary to the proceeding in the original suit, or a dependency upon it. They did not seek discovery, nor were they asking for an accounting, for the amount alleged to be due was clearly set forth by Gruetter & Joers, who made the accounting themselves. It was a new and distinct matter, not within the scope of the original bill; and while it perhaps grew out of the transaction which was the basis of the bill, Gruetter & Joers had put it out of their power to seek equitable relief by the bringing of the suit for damages.

The circuit court for the southern district of Alabama, in the case of the *Fidelity Trust and Safety Vault Co. vs. The Mobile Street Railway Co.*, 53 Fed. Rep., 852, speaking through Judge Toulman, says:

"A cross bill can be sustained only on matters growing out of the original bill and embraced in it. It cannot be used as a means of obtaining relief in respect to a cause of action wholly unconnected with the complainant's cause of action. Neal vs. Foster, 34 Fed. Rep., 496; Rubber Co.

vs. Goodyear, 9 Wall., 807; Manufacturing Co. vs. Prime, 14 Blatch., 371; Cross vs. De Valle, 1 Wall., 1 Story Eq. Pl., Sec. 389; Stonemetz Printer's Mach. Co. vs. Brown Mach. Co., 46 Fed. Rep., 851.

"The purpose of the original bill in this case is to foreclose a mortgage executed by the defendant to the complainant as trustee for the holders of the defendant's bonds. The petition, in the nature of a cross bill filed by F. J. Gasquet and others of said bondholders, is chiefly for the purpose of recovering damages of the complainant for alleged negligent or improper execution of the trust, and by which it is claimed petitioner sustained large damages. *This petition presented as a cross bill offends against the well settled rule which forbids the introduction into such a bill of any new and distinct matter not within the scope of the original bill. The matter set up in the cross bill is not necessary as a defense to the original bill, but is indeed matter entirely foreign to the primary object of the bill.* My opinion is that it is really an original, independent bill."

Stonemetz Printer's Mach. Co. vs. Brown Mach. Co., 46 Fed. Rep., 851.

C.

The fact that citizens of one state are both sued as respondents in one bill in the circuit court does not confer any power on them to litigate controversies between themselves which they could not have litigated by original bill in that court.

There was no federal question involved in the issues of the cross-bill. The right of Gruetter & Joers did not depend upon the construction of any act of Congress, or the constitution, but the sole question in this alleged cross bill was whether fraud was practiced by Stuart against them suffi-

cient to warrant recovery by them of damages. As Gruetter & Joers and Stuart were all citizens of the state of Nebraska, and so shown to be by the pleadings, and the matter being an independent controversy, unconnected with the subject matter of the receiver's bill, the court had no jurisdiction over the alleged cross bill, and the circuit court of appeals did right in so holding and dismissing the same.

The case of *Vannerson vs. Leverett* in the United States circuit court for the southern district of Georgia, 31 Fed. Rep., 376, is a case similar to the one at bar. It was a creditor's bill filed against Vannerson and Leverett. Vannerson filed a cross bill against his co-defendant, Leverett, seeking to obtain relief in a certain alleged indebtedness which existed between themselves. Leverett filed his plea to the jurisdiction of the United States court, averring that both he and Vannerson are citizens of Georgia. There was a demurrer to the plea on the ground that the bill filed by the complainant was a creditor's bill, and that the jurisdiction of the court with such a bill did not depend upon the citizenship of the parties. The court says (page 377):

"If it be true that Vannerson and Leverett are both citizens of Georgia, the one can have in this court no relief against the other in a cross bill filed to an original bill against them both, *which he could not have obtained by original bill here.* In other words, the fact that they are both sued in one bill here does not confer any power on them to litigate their controversies *inter sese* in this court. Most clearly, if the plea is true, Vannerson has no standing in this court as a suitor by original bill. He prays no relief against Bates, Reed & Cooley. His cross bill has no relation to the subject matter of this suit, nor is this cross bill in any sense a reply to the allegations of the original bill.

The circuit court of the United States is limited in its jurisdiction, and when it does not obtain, it is an inflexible rule that the judicial power of the United States must not be exerted, even if both parties desire to have it exerted. Railway Co. vs. Swan, 111 U. S., 379; 4 Sup. Ct. Rep., 510; Cross vs. De Valle, 1 Wall., 5. The argument that the original bill was a creditor's does not and cannot enlarge the jurisdiction of the court so limited; nor does the argument *ab inconveniente* of the solicitor for the complainant have any place in such a court."

In any view of the case, and upon any theory, the decree and finding of the circuit court of appeals as to the alleged cross bill of Gruetter & Joers is correct, and the decision should be affirmed.

C. C. FLANSBURG,
Counsel for Appellee, A. P. S. Stuart.

November 15, 1897.

No. 151.

Brief of Lambertson v. Harvey for Appellee

DEC 2 189
JAMES H. McKENN

IN THE

Supreme Court of the United States.

Filed Dec. 2, 1897.

No. 151.

AMBROSE P. S. STUART,
Appellant,

v.

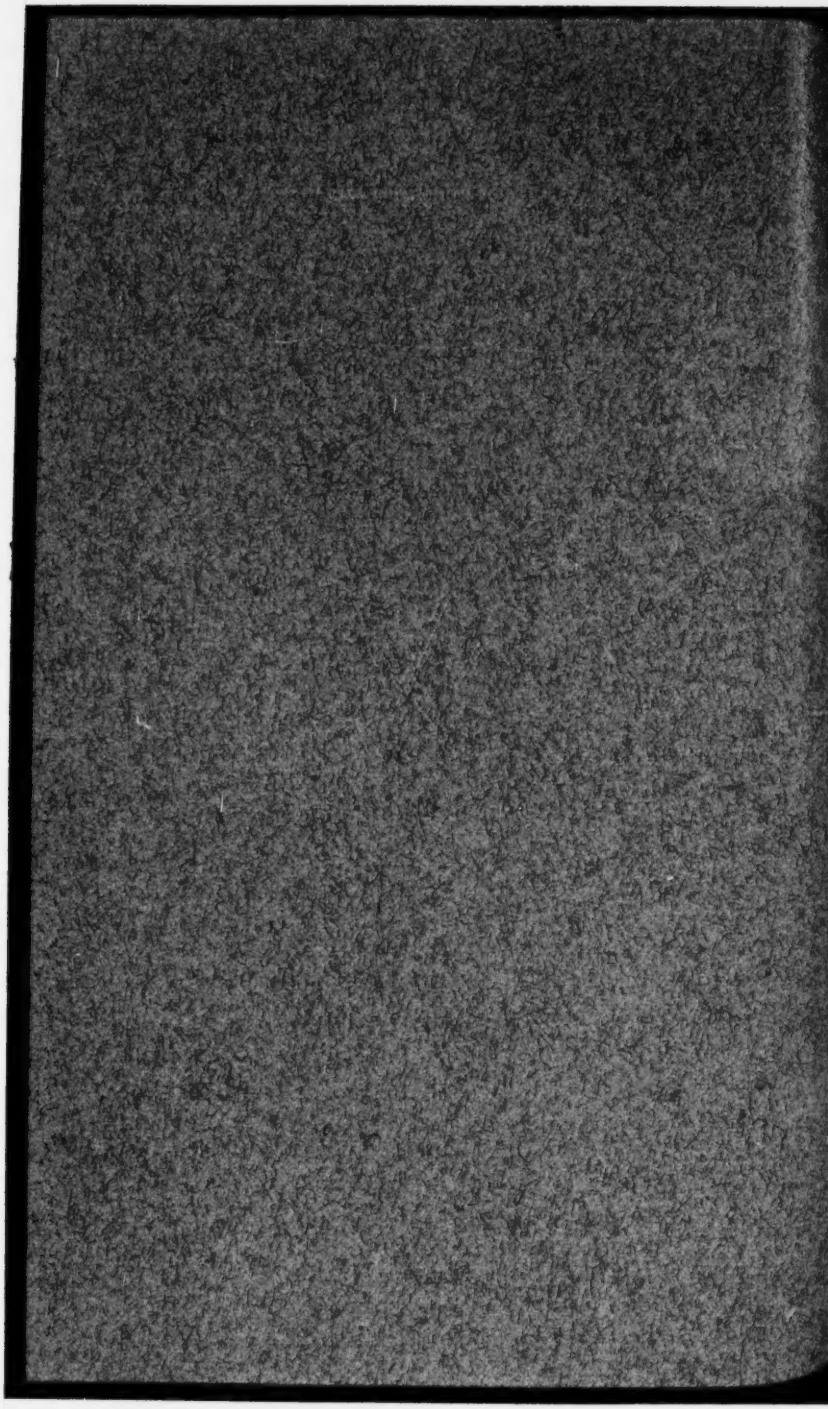
KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLEE KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK.

G. M. LAMBERTSON,
AMASA COBB,
A. E. HARVEY,
F. M. HALL,
Solicitors for Kent K. Hayden, Receiver.

STATE JOURNAL CO., PRINTERS AND STATIONERS, LINCOLN, NEB.



In the Supreme Court of the United States.

OCTOBER TERM, 1897.

AMBROSE P. S. STUART,
Appellant,
v.
KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA,
Appellee.
No. 151.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLEE KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK.

The appellee Kent K. Hayden was complainant in the court below. In his amended bill he alleges:

1. That the Capital National Bank failed and became insolvent on the 23d day of January, 1893; that the comptroller of the currency appointed John D. Macfarland receiver of said bank on or about the 1st day of February, 1893; that on the 31st day of May, 1893, he was succeeded by Kent K. Hayden, who entered upon the duties of his office as receiver on the 1st day of June, 1893.

2. That on the 10th day of July, 1893, the comptroller made an order directing the receiver to call an assessment on all of the stock to the amount of one hundred cents on the dollar.

3. That on the 24th day of December, 1892, the respondent Ambrose P. S. Stuart was a stockholder in said Capital National Bank, and there was standing in his name on the books of said bank one hundred and fifty shares of stock; that on said date the said bank was in a failing condition, was insolvent, which was known to the said respondent Stuart, personally, also officially as director of the Capital National Bank.

4. The bill further avers that the respondent Stuart, with full knowledge of the failing condition and insolvency of the bank, and in expectation and anticipation of its early and near approaching failure, and the necessary enforcement of his liability as a shareholder, and to defraud said bank and its depositors and creditors, and to render it impossible in case of a failure of the bank (which said Stuart believed, and had reason to believe was imminent and could not be long delayed) and to place it out of the power of the comptroller to enforce the liability of said Stuart upon his stock in case of a failure of the bank, and for the purpose of avoiding his liability, and of cheating and defrauding the said bank and its depositors and creditors, did on the 3d day of January, 1893, sell and cause to be transferred on the books of said bank, by proceedings regular in form, but which in fact were illegal, null, and not made in good faith, to Gruetter & Joers, who were pecuniarily irresponsible and unable to pay the amount of said assessment.

5. The bill alleges that by reason of the pretended sales and transfers of said stock by said Stuart to Gruetter &

Joers, and the insolvency of the said Gruetter & Joers, the said complainant is deprived of his remedy at law for the collection of his said assessment.

6. The receiver prays in his bill that said Stuart be required to make full, true, and direct answer to all matters and particulars charged in the bill, as fully, distinctly, and particularly as if he were distinctly interrogated in the bill, and also prays that the court decree Ambrose P. S. Stuart to be the legal owner of said shares of stock, and that the transfer to said Gruetter & Joers be set aside and the respondent Stuart be decreed to pay the complainant the amount of said assessment, together with interest from the 10th day of July, 1895.

7. When the original bill was filed Gruetter & Joers were not made parties defendant, and a demurrer was interposed to the bill chiefly on that ground, and pursuant to the requirement of the circuit court Gruetter & Joers were made parties defendant. Gruetter & Joers were in this way brought in at the instance of defendant Stuart.

A decree was entered as prayed for Kent K. Hayden, receiver, both in the circuit court and in the court of appeals. This appeal is brought to reverse that decree.

I.

The transfer by Stuart of one hundred and fifty shares of stock in an insolvent national bank to escape his liability as a stockholder is void as to the creditors of the bank, and the receiver of the bank may sue the transferrer to recover an assessment made by the comptroller on the stock.

A stockholder in a failing corporation, or who, in view of impending insolvency of the corporation, for the purpose of escaping the liability of a shareholder, transfers his stock, can, notwithstanding such transfer, be held for a stock assessment.

This is sustained by Cook on Stockholders, secs. 263 and 265:

> In the United States a transfer of shares in a failing concern, made by the transferrer with the intention and for the purpose of escaping liability as a shareholder, to a person who for any cause is incapable of responding in respect of such liability, is void, both as to creditors of the company and to other shareholders; and that, too, although, as between the transferrer and transferee, the transaction may have been absolute and no secret trust involved.
>
> See the large number of cases cited in the footnote.

The rule announced in *Bowden v. Johnson*, 107 U. S., 251, is as follows:

> Where a holder of shares of stock in national bank, who is possessed of information showing that there is good ground to apprehend the failure of the bank, colludes with an irresponsible person with the design of substituting the latter in his place and thus escaping his individual liability as imposed by section 12 of the act of June 3, 1864, and transfers his shares to such person, the transaction is a fraud upon the creditors, and the liability of the transferrer to them is not thereby affected.

While the court decides that where transferrer colludes with an irresponsible person he cannot escape his individual liability, yet it cannot be said that the court held *that it was necessary* to allege or prove the collusion of the stockholder with his transferee in order to recover.

In *National Bank v. Case*, 99 U. S., 631, the court say:

> We have, then, only to inquire whether the bank succeeded in throwing off that liability by its transfer to its clerk, Waldo. It certainly did not thereby divest itself of its substantial ownership. It is not every transfer that releases a stockholder from his responsibility as such. While it is true that shareholders of the stock of a corporation generally have a right to transfer their shares, and thus disconnect themselves from the corporation and from any responsibility on account of it, it is equally true that there are some limits to this right. A transfer for the mere purpose of avoiding his liability to the company or its creditors is fraudulent and void, and he remains still liable. The English cases, it is admitted, give effect to such transfers, if they are made (as it is called) "out and out;" that is, completely, so as to divest the transferrer of all interest in the stock. But even in them it is held that if the transfer is merely colorable, or, as sometimes coarsely denominated, a sham—if, in fact, the transferee is a mere tool or nominee of the transferrer, so that, as between themselves, there has been no real transfer, "but in the event of the company becoming prosperous the transferrer would become interested in the profits, the transfer will be held for naught, and the transferrer will be put upon the list of contributories." (*Williams' Case*, Law Rep., 9 Eq., 225, note, where the transfer was, as in the present case, made to a clerk of the transferrer without consideration; *Payne's Case*, Id., 223; *Kintrea's Case*, Law Rep., 5 Ch., 95. See, also Lindley on Partnership (2d ed.), p. 1352; *Chinnock's Case*, 1 Johns. Ch. (Eng.), 714; *Hyam's Case*, 1 De G., F. & J., 75; *Budd's Case*, 3 Id., 296.) The American doctrine is even more stringent. Mr. Thompson states it thus, and he is supported by the adjudicated cases: "A transfer of shares in a failing corporation, made by the transferrer with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect to such liability, is void as to the creditors of the company and as to other shareholders, although as between the transferrer and the transferee it was out and out." (*Nathan v. Whitlock*, 9 Paige (N. Y.), 152; *McClaren v. Franciscus*, 43 Mo., 452; *Marcy v. Clark*, 17 Mass., 329; *Johnson v. Laflin*, by Dillon, J., 6 Cent. Law Jour., 131.)

> The case in hand does not need the application of so rigorous a doctrine. While the evidence establishes that the Crescent City was in a failing condition when the transfer to Waldo was made, and leaves no reasonable doubt that the Germania Bank knew it and made the transfer to escape responsibility, it establishes much more. The transfer was not an out and out transfer. The stock remained the property of the transferrer. Waldo was bound to retransfer it it when requested, and all the privileges and possible benefits of ownership continued to belong to the bank. No case holds that such a transfer relieves the transferrer from his liability as a stockholder. We are, therefore, compelled to rule that the decree of the circuit court against the Germania Bank was correct. Its case, no doubt, is a hard one, but it is not in our power to give relief without a sacrifice of the well-established rules of law and equity, both in this country and in England.

The attention of the court is directed to the fact that the supreme court cites with approval the doctrine laid down in Thompson on Liability of Stockholders, but says it is not necessary to apply such rigorous doctrine. The clear inference is that the court would have applied the rule stated by Mr. Thompson had it been necessary to do so. In fact the court say on page 632:

> *A transfer for the mere purpose of avoiding his liability to the company or its creditors is fraudulent and void and he remains still liable.*

In *Richmond v. Irons*, 121 U. S., 48, the court sustains our contention. One of the defendants, Charles Comstock, admitted in his answer that previous to the year 1872 he was the owner of 150 shares of stock; that on the 8th day of February, 1873, he sold and assigned fifty shares of stock to Ira Holmes, and in June, 1873, fifty to Preston J. Maynard; that he endeavored repeatedly to have the stock transferred on the books of the bank, but that Maynard refused to allow

it to be done; that at the time of making said transfers he believed the bank to be solvent; that on September 23, 1873, he sold and assigned to Ira Holmes another fifty shares of stock; that he at that time believed the bank was able to pay all of its debts. The stock books introduced in evidence show that fifty shares of this stock were transferred September 23, 1873, fifty more September 24, 1873, and fifty more were canceled on the last date. The bank became insolvent on September 23, 1873, and went into voluntary liquidation September 26, 1873. The court say:

> As to the fifty shares of stock sold by Comstock to Holmes on September 23, 1873, we think the conclusion cannot be resisted that the transaction was made in contemplation of the insolvency of the bank, and, although both parties may have believed that the bank would ultimately be able to pay all of its debts, notwithstanding this transaction, we think that, as against creditors, it was fraudulent in law, and to that extent Comstock is chargeable as a shareholder. The sale of fifty shares in February, 1873, and the other fifty shares in June, 1873, there is no reason to suppose were not made in entire good faith, and without any expectation on the part of the parties of the insolvency of the bank. Notwithstanding that, Comstock continued to be upon the books of the bank the owner of these shares until September 23 and September 24, when they were respectively transferred.
>
> By section 5139 of the Revised Statutes, those persons only have the rights and liabilities of stockholders who appear to be such as are registered on the books of the association, the stock being transferable only in that way. No person becomes a shareholder, subject to such liabilities and succeeding to such rights, except by such transfer; until such transfer the prior holder is the stockholder for all the purposes of the law. It follows, therefore, that Charles Comstock, in respect of the shares sold by him in February and June, 1873, was the statutory owner on the 23d day of September, 1873. His liability as such stockholder is the same as if he had that day sold and transferred the stock to Ira Holmes, *but such a sale and transfer could only have been made that day by Com-*

stock, who was himself a director, in contemplation and actual knowledge of the suspension of the bank; it would operate as a fraud on the creditors, an effect which the law will not permit.

It will be noticed from reading this case that the court holds, at least inferentially, that it is not necessary to transfer the stock to an irresponsible person; that it is not necessary that the transfer be collusively made, but that the liability remains with the original holder of the stock if he sold the stock or transferred it in contemplation, and with actual knowledge of the impending suspension of the bank. If he does it for such purpose, and with such knowledge, it is a fraud upon the creditors of the bank.

Davis v. Stevens, 17 Blatchf., 259.
Bundy v. Cocke, 128 U. S., 185.
Johnson v. S. W. R. R. Bank, 3 Strobh. Eq. (S. C.), 263.
Nathan v. Whitlock, 9 Paige, 152.
McClaren v. Franciscus, 43 Mo., 452.
Marcy v. Clark, 17 Mass., 329.

In *Johnson v. Laflin*, 5 Dillon, 86, Judge Dillon says:

> While we maintain the right of the shareholder to dispose of his shares, absolutely, by out and out sale, and registered transfer and thus escape liability, provided the sale is made *bona fide*, and the purchaser is in law capable of assuming the liabilities of the transferrer, *yet this does not involve the right to transfer shares for a fraudulent purpose, or under circumstances which the transferrer knows will make the transfer, if it if sustained, work a fraud upon the other shareholders, or upon the creditors of the bank.*

In *Marcy v. Clark*, 17 Mass., 334, Chief Justice Parker says:

> We cannot doubt then that the transfer of an interest in the stock of such corporation not *bona fide*, but for the purpose of defeating the creditors of the company, is fraudulent and void.

Wait on Insolvent Corporations, 574.
Pauly v. State Loan & Trust Co., 165 U. S., 606.
Sykes v. Holloway, 81 Fed. Rep., 432.

II.

That the transfer of the stock by Stuart to Gruetter & Joers was made when the bank was insolvent is conclusively established by the evidence.

Kent K. Hayden, receiver of the bank, testifies that he was appointed and entered upon his duties as receiver June 1, 1893. (Record, 94.)

He has been connected with national banks for twenty-three years, and has successively occupied the position of messenger, book-keeper, teller, cashier, and United States bank examiner, and is an expert accountant.

The order for the assessment of the stock by the comptroller was made June 10, 1893. The respondent Stuart purchased one hundred shares of stock in the Capital National Bank November 1, 1884, and fifty shares of stock July 1, 1886. He was a stockholder from said dates to the 3d day of January, 1893, when the certificates were returned to the bank and reissued to the firm of Gruetter & Joers. (Record, 94, 95.)

The bank closed its doors January 21, 1893. (Record, 97.)

Due demand for payment of the stock assessment was made, but the same has not been paid (pp. 97, 98).

General Character of Assets.

Mr. Hayden testifies that the bills receivable on hand

amounted to $519,600, and those not on hand amounted to $141,000. (Record, 99, 100.)

Of the bills receivable on hand, $58,596.82 were good, $141,393.27 were doubtful, and $319,611.90 were worthless.

Of the bills receivable not on hand, all were worthless except about $10,000. (Record, 102.)

Worthless Notes.

There were on hand at the date of the failure of the bank worthless notes of R. C. Outcalt, cashier, to the amount of $58,091; of C. W. Mosher to the amount of $84,294.48; of E. W. Mosher to the amount of $97,658; Western Manufacturing Company notes to the amount of $125,000, and Marsh notes $17,000. Mr. Hayden also enumerates a number of other notes that were worthless. (Record, 102, 103.)

Maturity of Notes.

Of the $141,000 of notes outstanding in the hands of other parties than the receiver of the bank $2,000 matured in 1886, $7,827 matured in 1887, $7,886 matured in 1888, $10,650 matured in 1890, $40,600 matured in 1891, and $27,452 matured in 1892. (Record, p. 104.) The overdue paper in the bank January 3, 1893, the day the stock was transferred, was $75,027.98. (Record, 119.)

Rediscounts.

The bank had outstanding rediscounts $331,359, and on this amount the bank is liable for $143,000, the makers being worthless to that extent. (Record, 104.)

Total Liabilities.

The total labilities of the bank are $1,463,013.17. The

total assets about $900,000. Claims allowed, $849,109. Not allowed, $613,903.70. (Record, 105.)

Certificates of Deposit.

The total amount of certificates of deposit outstanding is $511,149. The amount shown by the books is only $97,301, a difference of $438,048. Certificates allowed, $356,149.49. Of these certificates allowed the books show $86,265.70. (Record, 105, 120.)

Manipulations.

The certificate of deposit register shows the greater number of manipulations, and for larger amounts. There is a great discrepancy between the amounts entered in this book and the certificates issued. (Record, 105, 106.)

The discrepancies between the amounts of the certificates of deposit and the entries in the certificate of deposit register are as follows:

Number.	Amount of Certificate Issued.	Amount Entered in Register.
25097	$50,000 00	$50 00
25047	37,975 00	975 00
24896	7,000 00	1,000 00
24981	2,000 00	20 00
24941	10,000 00	5,000 00
25636	50,000 00	100 00

(Record, 105, 106, 107.)

Bad Debts.

There were no bad debts charged off the books from the organization of the bank up to the 2d of February, 1892, when $30,000 of the surplus was charged off. During the first year the bank, by the failure of Donnell, Lawson &

Simpson, bankers of New York City, lost $30,300. (Record, 107.) There are a number of other losses mentioned by Mr. Hayden in his testimony. (Record, 107, 108, 109, 110.)

Interest Paid Account.

The bank kept an account called the "Interest Paid Account," in which were debits of interest paid by the bank on deposits received, and it also had an "Interest Account," in which were credited interest received on money loaned. There should be no credits in the "Interest Paid Account," all credits appearing in the "Interest Account," yet we find that on December 29, 1884, the "Interest Paid Account" was credited with $813, and successive credits were made from time to time from that date until in 1892 there appears one entry as high as $14,000. These credits were given about the time dividends were paid. On account of the large amount of money on deposit for which the bank was paying interest, no dividend could have been returned except for these fictitious entries of credit. These credits amounted, all together, to $108,916.44. (Record, 110, 111, 112.)

False Entry of $100,000 in Individual Ledger Account.

On December 24, 1889, the individual ledger account, in which were entered the deposits of creditors of the bank, and which contained the account of J. E. Hill, state treasurer, was credited with $100,000, without any money having been paid into the bank. This increased the liability of the bank $100,000 more than the bank had apparent assets to cover. By this entry the books were thrown out of balance for three years. (Record, 114.)

Other Manipulations.

April 25, 1891, the certificate of deposit account was

charged $100,000 and a certificate of deposit issued to J. E. Hill for $100,200. This certificate in fact was never delivered to Hill, but it enabled Mosher to draw out and use for his private purposes $100,000. (Record, 115.)

Western Manufacturing Company Paper.

The Western Manufacturing Company was not a company in fact, but was simply a name used by C. W. Mosher. Under that name he had formerly been engaged in a manufacturing business, but six or seven years ago he sold out that business to a corporation which was organized and took the same name, of which M. D. Welch was manager, and which was a solvent concern with high credit. Mosher caused notes to be issued in the name of the Western Manufacturing Company, signed by E. Hurlbut, Jr., for $755,000 which were negotiable with eastern banks and were renewed from time to time, so that there was on hand, at the failure of the bank, $125,000 in the bank and $110,000 held by other banks, on which the Capital National Bank was endorser. The Western Manufacturing Company was a fictitious concern and its notes were absolutely worthless. (Record, 116, 117.)

Reports to the Comptroller.

From time to time numerous reports were made to the comptroller of the currency, which were prepared by Mosher and verified or attested by the directors. A large number of these were signed by respondent Stuart. They were nearly all of them false, and a slight examination of the books would have shown this fact. (Record, 118.)

Overdrafts.

The overdrafts in the bank at the time respondent Stuart sold his stock, December 16, 1892, were $33,767.20. (Record, 119.)

In the report of September 30, 1892, signed by Stuart, the suspended and overdue paper was $43,686.54; liability of directors, $17,898.72, and the loans exceeding the limit were as follows: E. W. Mosher, $48,950.28; J. W. Small, $56,752.53. In addition there were scheduled as being owned by the bank a large amount of land—in York county, 2,000 acres; in Hamilton county, 400 acres—to secure an indebtedness of $38,617.92; estimated value of the property, $65,000. Also lands in Nuckolls county, 1,280 acres, and in Clay county, 900 acres, to secure a loan of $56,752.53; estimated value of property, $75,000. (See record, Exhibit 74. See Stuart's testimony, 35.)

The above summary of the facts in the record establish the insolvency of the bank at the date of the transfer of the stock.

III.

Stuart being a director of the Capital National Bank and a member of the finance committee and in daily attendance at the bank, with access to the books, is charged by the law with knowledge of its insolvency.

The evidence shows that Stuart was a stockholder and director of the bank from the date of its organization. As a member of the finance committee it was his duty, as it was his custom, to examine the paper of the bank once every three months. He was at the bank almost every day, and frequently examined the books containing the interest received account, so as to approximate the amount of the next dividend. He attended nearly every meeting of the board of directors, and in almost every case the dividend declared was made on his motion. He signed nearly all the reports

made to the comptroller purporting to show the full, complete, and exact condition of the bank at the close of business of the day named inthe comptroller's call. He signed a special report to the directors stating that he had examined the affairs of the bank and found them in good condition. Moreover, he knew that no losses or bad debts had ever been charged off during the whole history of the bank until a short time before the failure of the bank, when the surplus was wiped out by order of the bank examiner.

In view of Stuart's position in the bank, and his attitude as an officer, and his opportunity for finding out its exact condition, will the court allow him to evade liability upon his disclaimer of actual knowledge of the bank's insolvency? Will it allow him to say: I was asleep during all these years and ignorant of the bank's condition? It seems to us the court must say: It was your duty to be awake and vigilant. You were not put there to be a figure-head, to vouch for the institution, but as a guardian of the money of the depositors. The patrons of the bank deposited their money on the faith that you would be watchful of their interests, and you cannot now plead your own wrong to evade responsibility, or escape liability by a plea of ignorance that could only arise from a total abdication by you of your powers, duties, and functions as an officer of the bank. However well the frauds of the officers were concealed from the depositors and creditors (as they undoubtedly were), they were readily discoverable by, if not patent to, the directors. The books contained numerous false entries and fraudulent manipulations, and the bad paper and worthless bills receivable and overdue notes reached astonishing figures.

Can Mr. Stuart willfully shut his eyes to these facts and circumstances, extending over a period of ten years, during which he received $15,000 and more in unearned dividends.

and then at the last moment (twenty days before the failure of the bank), when the concern was tottering to its fall, evade his statutory liability by a disclaimer of knowledge or the plea of dense and profound ignorance? If so, then the law puts a premium upon gross negligence and willful disregard of duty.

Gibbons v. Anderson, 80 Fed. Rep., 348.

We therefore earnestly contend in this case, whatever may be the rule in other cases under different facts and circumstances, that the law impute knowledge of the wrecked condition of the bank to Stuart at the time he transferred his stock to Gruetter & Joers.

The language of Chief Justice Beasley in *Williams v. Mackay*, 40 N. J. Eq., 179, is appropriate:

> I entirely repudiate the notion that this board of managers could leave the entire affairs of this bank to certain accredited men and then, when disaster to the innocent and helpless *cestui que trustent* ensued, stifle all complaints of their neglect by saying, we did not do these things, and we know nothing about them. * * * The misconduct in question was manifest in every instance, and it is not easy to imagine how they, or some of them, failed to be discovered by these boards of managers on a suspicion which in their favor the law will make that they exercise their office in this respect with a responsible degree of vigilance. *The neglectful acts in question cannot be regarded by the court as isolated instances, for they run through the whole period of the institution, and thus evince a systematic and habitual disregard of the directions of the company's charter and their striking indifference to the security of the money held in trust.*

The supreme court in *Martin v. Webb*, 110 U. S., 7, has said:

> Directors cannot in justice to those who deal with the bank, shut their eyes to what is going on around them. It is

their duty to use ordinary diligence in ascertaining the condition of its business and to exercise reasonable control and supervision of its officers. *They have something more to do than from time to time to elect the officers of the bank and to make declarations of dividends.* That which they ought by proper diligence to have known as to the general course of business in the bank, they may be *presumed* to have known in any contest between creditors and those who are justified by the circumstances in dealing with those officers on the basis of that course of business.

In *Cutting v. Marlor*, 78 N. Y., 454, Chief Justice Church, delivering the unanimous judgment of the court, says:

A corporation is represented by its president and managers. Their acts are its acts, and their neglect its neglect. The employment of agents of good character does not discharge their whole duty. It is misconduct not to do this, but in addition they are required to exercise such supervision and vigilance as a discreet person would exercise over his own affairs. *The bank might not be liable for a single act of fraud or crime on the part of an officer or agent, while it would be for a continuous course of fraudulent practice, especially those so openly committed and easily detected as these are shown to have been. Here was no supervision, no meeting, no examination, no inquiry.*

This case was referred to with approval in *Preston v. Prather*, 137 U. S., 604.

Hun v. Carey, 82 N. Y., 65.

Charitable Corporation v. Sutton, 2 Atk., 400.

In *Land Grant Company of Ireland v. Lord Fermoy*, L. R., 5 Ch., 763, Lord Hatherly said.

I am exceedingly reluctant in any way to exonerate directors from performing their duty, and I hold that it is their duty to be awake, and that their being asleep would not exempt them from the consequences of not attending to the business of the company.

Cook on Stockholders, 547 and 708.

Boone on Banking, 86.

In *Main v. Mill*, 6 Bissell, 98, Judge Blodgett says:

> The officers of a corporation are bound to know the condition of its affairs, and have no right to receive a dividend unless legitimately earned.

Stuart was both a director and stockholder, and the language of the supreme court in *Glenn v. Liggett*, 135 U. S., 546, is in point:

> As between creditors and stockholders it would seem to be singular if the stockholders could protect themselves from paying what they owe by setting up the default of their own agents.

In *Gibbons v. Anderson*, 80 Fed Rep., 348, the court say:

> The idea which seems to prevail in some quarters, that a director is chosen because he is a man of good standing and character, and on that account will give reputation to the bank, and that his only office is to delegate to some other person the management of its affairs, and rest on that until his suspicion is aroused, which generally does not happen until the mischief is done, cannot be accepted as sound.
>
> *Robinson v. Hall*, 63 Fed. Rep., 223.

Counsel for appellant cite *Briggs v. Spaulding*, 141 U. S., 133. That case does not controvert our contention, but supports it. I quote from the syllabus:

> Directors of a national bank must exercise ordinary care and prudence in the administration of the affairs of the bank, *and this includes something more than officiating figure-heads.* They are entitled under the law to commit the banking business, as defined, to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision, *nor ought they to be permitted to be shielded from liability because of want of knowledge of wrong doing, if that is the result of gross inattention.*

Our claim here is that Stuart was nothing but a figure-head, and that his want of knowledge of wrong-doing and negligence, if his claim in that respect be true, was the result of gross inattention to his duties as a director, and therefore the law imputes to him, and charges him with, notice of the insolvent condition of the bank at the time he sold and transferred his stock.

IV.

Stuart had actual notice of the insolvency of the bank at the time he transferred his stock.

It is, however, not necessary for us to rest our case on the above proposition that Stuart was bound to take notice of the condition of the bank, for we confidently affirm that Stuart had actual notice of the insolvent condition of the bank.

The statement of the appellant, that there is no evidence to show that he had actual notice of the insolvent condition of the Capital Bank, finds no support in the record.

In the first place, the appellant is an intelligent, educated man, formerly a professor, connected with Harvard University and other institutions (see page 39 of record), was a money loaner, and handled large sums of money, and was, therefore, well qualified to understand the bearing of the facts which came to his knowledge concerning the management and condition of the bank.

He was, in fact, a financial expert. For ten years he was a director of the bank. He was a member of the finance

committee, whose particular duty it was to examine and scrutinize the paper of the bank and report its condition to the directors. The evidence shows that he knew that the bank held a large amount of the paper of E. W. Mosher. (Record, 45.) In fact this paper of E. W. Mosher footed up to $97,658.85 (record, 102), and, as shown by the evidence of Mr. Hayden, was absolutely worthless.

In this connection we call attention to the fact that Professor Stuart testified that because C. W. Mosher had endorsed the E. W. Mosher paper, he considered it good (record, 45), but he elsewhere testified (record, 36) that he was dissatisfied with C. W. Mosher and his methods and believed "he was not the kind of a man to manage their money."

Again, the appellant knew of the loss to the bank resulting from the failure of Donnell, Lawson & Simpson, $30,300. (Record, 41.)

He was cognizant of losses occasioned by the failure of the Sherman County Banking Company, $14,000. (Record, 42.)

He knew that from $40,000 to $50,000 of the bank's money was tied up in real estate in Nuckolls and Clay counties. (Record, 43, Exhibit 74.)

He knew of the worthless Marsh paper to the extent of about $30,000. (Record, 49, 50.)

Stuart was acquainted with the Western Manufacturing Company paper (record 47), but could not remember whether there was in the bank $100,000 of this bogus paper.

On the morning of the failure of the bank he said to Mrs. King (record 136, testimony of Mrs. King):

> He did not like the way the bank had been doing for a long time. He did not like their going into the Western Manufacturing business, and he said he had talked with Mosher about it, and he did not like the Arkansas business, and he said they went into the skating rink business and he said he then felt mad, and he said this is not banking, and then, when they went into the base ball business he said it must be stopped; that we must stop that and do a banking business and not run after these outside affairs. * * * I have known for quite awhile they had some bad debt such as very poor paper there, amounting to about $136,000, and I did not like the way they were doing. (See Stuart's testimony, record, 36.)

Again, page 137, Mrs. King says:

> *He [Professor Stuart] went on and told me about it; he said he had not liked the management of the bank, and felt anxious about it, and I asked him how long, and he said a long time. I asked him why the bank was not closed in the condition it was, and asked him if he did not know that the bank's capital was impaired, and he said that it was.* * * *

The above conversation took place the morning of the failure of the bank, and Professor Stuart's knowledge of the bank's condition had come to him as an officer of the bank, and not from outside rumor.

Again, in conversation with Mr. Gerner, three months before the failure of the bank (record, page 141), Professor Stuart said that about $140,000 of the bank's capital was tied up in land and that he did not like the way the bank was managed. Mr. Gerner says:

> I guess it was after he made the trade; either he told me about it, or I took occasion to remark "I see you made that trade, professor." "Yes," he says, "I did." He says, "As I

told you before, I don't like Mosher & Outcalt's way of doing business, and I shall prefer to manage my own affairs hereafter."

This shows that the prime consideration with the appellant in making the trade was to get rid of his stock in the bank.

It is evident that Stuart knew much about the condition of the bank three months before it closed.

Let us recapitulate the various items of knowledge of the appellant:

Paper of E. W. Mosher	$97,000 00
Paper of Donnell, Lawson & Simpson	30,300 00
Paper of Sherman County Banking Company	14,000 00
Nuckolls and Clay county land, capital locked up	50,000 00
Marsh paper	30,000 00
Western Manufacturing Company paper—will not testify—he did not know	100,000 00
Total	$321,300 00

The capital of the bank was $300,000. The knowledge of $271,000 of worthless paper, and $50,000 tied up in land, must have created a suspicion in the mind of Stuart that the bank was in a failing condition even if he had not "actual notice" of that lamentable fact.

There is further evidence of a most convincing character that the appellant had full knowledge of the crippled condition of the bank.

In the record, between pages 206 and 207, will be found copies of the reports of the condition of the bank, made to

the comptroller of the currency, showing its condition September 25, 1891, December 2, 1891, March 1, 1892, May 17, 1892, and September 30, 1892. Each of these reports is attested by the appellant as director.

It cannot be said with any degree of plausibility that appellant did not have actual notice of the matters contained in these reports attested by him; nor should he be permitted to disclaim such notice. The report of September 25, 1891, shows that there were (see record, 206, Exhibit 70):

Bad debts	$12,000 00
Other suspended and overdue paper	37,461 92

The report of December 2, 1891, shows (record, 206, Exhibit 72):

Bad debts	$14,000 00
Suspended and overdue paper	39,847 92

The report of March 1, 1892, shows (record, 206, Exhibit 71):

Suspended and overdue paper		$87,643 19
Loans exceeding lawful limit	E. W. Mosher	50,950 28
	J. W. Small	51,752 53

The report of May 17, 1892, shows (record, 206, Exhibit 73):

Suspended and overdue paper		$36,484 01
Loans exceeding lawful limit	E. W. Mosher	48,950 28
	J. W. Small	51,752 53

The report of September 30, 1892, shows (record, 206, Exhibit 74):

Suspended and overdue paper		$43,686 54
Loans exceeding lawful limit	E. W. Mosher	48,950 28
	J. W. Small	56,752 53

These reports were all signed and attested by Stuart.

It seems that after the report of December, 1891, there were no bad debts reported, although Mr. Hayden testifies (record, 116) that of the bills receivable in the bank at suspension $319,611.91 were worthless.

U. S. v. Allis, 73 Fed. Rep., 165.
U. S. v. Allen, 47 Fed. Rep., 699.
Finn v. Brown, 142 U. S., 56.

Moreover, a person is in equity charged with knowledge of facts of which he is not actually cognizant, when put upon an inquiry which would lead him to the facts if intelligently and diligently pursued. Counsel for the appellant would certainly not impute to his client ignorance of suspicious circumstances, which, if intelligently pursued, would have led to a knowledge of the bankrupt condition of the bank at the time Stuart sold his stock.

V.

The evidence is clear that Stuart transferred his stock with intent to escape liability.

In addition to the almost conclusive presumption, that, with full knowledge of the insolvent condition of the bank, the transfer made by Professor Stuart was made with intent to relieve himself from his statutory liability, we have his statements which virtually admit that he made the trade with Gruetter & Joers because he could thereby get rid of his bank stock. We quote from testimony of Henry Gerner (record, 141):

> Well, one afternoon I met the professor, which was an almost daily occurrence, if I did not see him in the bank I met

him on the street, and we passed the compliments of the day, and some remarks, and one day in one of our conversations and talks, he told me that he was contemplating a real estate deal. I said, "yes, yes." He says he had a proposition made him to purchase the Gruetter block down here, and it was a trade, and he said if he made the trade at all, it would be trading his bank stock and some money, and assuming their liabilities, their obligations, a mortgage on the building for $30,000. I told him I thought it was rather an exorbitant price for the property, that I did not consider the building worth any such money; to which he responded that they were going to take a very good lease, they would take it for ten years,—a ten-year lease on the premises at a rental of $6,000 a year. I told him I did not think it was possible for those men in the business to pay any such rent; it was too risky. "Well," the professor replied, "we have to take some risk." "Well," I said, "I should rather, if I was in your place hold my stock and my interest in the bank. I think it is better or safer." *He said he did not like the way they were doing business; he did not like the style, and a large share of the bank's capital was tied up in real estate, and there was no prospect of dividends and he preferred to do his own business and manage his own affairs.*

Question. Did you have any subsequent conversation with him about the matter?

Answer. Well, yes. I guess it was after he made the trade; either he told me about it, or I took occasion to remark, "I see you made that trade, professor." "Yes," he says, "I did." He says, "As I told you before, I don't like Mosher & Outcalt's way of doing business, and I shall prefer to manage my own affairs hereafter."

In each conversation Professor Stuart makes prominent his dissatisfaction with the management of the bank, and shows plainly that his real motive in making the trade was to rid himself of the stock. Subsequent developments, showing the rottenness of the bank, then known to Professor Stuart, indicate that his dissatisfaction with the bank was greater than he made known to Mr. Gerner.

Of peculiar significance in this connection is the subseuent transfer by Professor Stuart of all of his real estate. It tends to show his animus in the entire transaction. It throws a back light on all his antecedent acts. After unloading his stock to Gruetter & Joers, and after the failure of the bank, to make "assurance doubly sure" that he would escape liability, he made pretended conveyances of all of his real estate to one Holland. It is only necessary to read Professor Stuart's testimony on the subject of these conveyances for one to be convinced that they were without consideration, and made for the sole purpose of covering up his property. His answers on cross-examination also show his disingenuousness and lack of candor. We quote from record, pages 82 to 92 inclusive:

> I was the owner of real estate at that time in Lincoln, Lancaster county, to the value of about $150,000.
>
> Q. Now, who has the title to all that property?
>
> A. Charles Holland.
>
> * * * * * * * * * * *
>
> Q. What was your object in conveying this property to Holland, any way? What was the purpose of it?
>
> A. Well, I decline to state what my purpose was.
>
> Q. *Was not your real purpose in conveying this property to Holland to defeat the collection of any suits that might be brought against you by the receiver of the Capital National Bank at any time, arising out of your connection as a director and stockholder of the Capital National Bank?*
>
> A. *I don't know but that a man would be justified in doing that. I don't say that was my motive, however.*
>
> Q. *Was not that your motive, professor?*
>
> A. *I decline to say. It is going into things which it seems to me are not particularly pertinent to this examination.*

It is worthy of note that since the giving of the above testimony Stuart has reconveyed under his power of attorney from Holland all of his lands to himself. See affidavit to appeal bond filed herein. (Record, 241.)

The ostensible consideration for the conveyance from Gruetter & Joers to Professor Stuart of the business block was $67,500, but Professor Stuart testifies (record, 70) that $60,000 would have been a pretty fair price at that time for the building and lease, which goes to show that he considered he was receiving $10,500 for his stock, which he claimed was worth $18,000, at which price he put it in the trade.

The other consideration consisted of the mortgage of $30,000, which Professor Stuart [illegible]sumed, and of $19,500 cash. There could be no discount [illegible]either of these two items, so that the discount of $7,500 [illegible]essarily falls upon the bank stock, so that the appellant stands in the position, by his own showing, of having sold his bank stock, which he claimed was worth $18,000, for $10,500.

This transaction shows that he, in fact, had knowledge of the bank's insolvency, and hence was willing to assume a large mortgage of $30,000 and pay out a large sum of money in cash, for the apparent purpose of getting rid of his bank stock at a large discount. It is not to be believed that this experienced banker, and educated business man, would have done this, except for his great anxiety and determination to get rid of his bank stock, and the liability to pay an assessment. The transfer was unquestionably "made to escape an impending calamity."

We think we have clearly shown from the facts appearing in the record that the appellant made this transfer for the purpose of escaping his statutory liability. We therefore are not compelled to rely upon the presumption expressed by the court in *Miller v. Great Rapids Ins. Co. et al.*, 50 Mo., 55, that

If a stockholder knew of the insolvency at the time of the transfer, it would be very strong evidence of fraud, and it would be hard to resist the conclusion that such transfer was made in bad faith.

VI.

Gruetter & Joers were insolvent or financially incapable of paying the stock assessment

We have shown that the bank was a wreck; that Stuart knew its failing condition; that he made the transfer in contemplation of its insolvency and to escape a liability *that had already attached to the stock, and for which suit would have then been instituted had the comptroller known the bank's true condition.*

Since the organization of the bank Stuart had been both a stockholder and director and had been the beneficiary of the large dividends that were fraudulently declared. It would seem most just and equitable, and the rule a salutary one, that he bear the burden put upon the stock by his own misconduct and gross negligence. The receiver proceeded upon the theory that Stuart *ought in equity* to pay this assessment, because by taking unearned dividends and by his gross neglect of duty he caused the liability in question to attach to the stock. The receiver is pursuing the wrongdoer and not his victim.

Must a creditor of the bank or his representative, the receiver, when he finds that a solvent stockholder, taking advantage of the knowledge afforded by his position as an officer, has attempted to escape a liability which he has by his own wrongful acts fastened on the stock, take an inventory of the worldly effects of the transferee and strike a bal-

ance of his assets and liabilities and ascertain his insolvency, before he can sue the transferrer of the stock? The test is whether the creditors are put in a worse position by the transfer; if so, the transferrer of the stock remains liable for the assessment.

The right of the receiver to sue the transferrer does not rest upon the insolvency of the transferee, but upon the *fraud* of the transferrer. It is the *fraudulent intent* of the transferrer that avoids the transfer and not the *insolvency* of his victim. If a transferrer of stock, without intent to evade a stock liability, and without knowledge of the insolvency of a company, sells his stock, then the right to proceed against the innocent transferrer might depend upon the question whether the vendee of the stock was insolvent, but the rule is different where the transfer is made in contemplation of insolvency and to escape liability. In *Bowden v. Johnson, supra*, the supreme court say:

> As such shareholder he became subject to the individual liability prescribed by the statute. This liability attached to him until, without fraud as against the creditors of the bank, for whose protection the liability was imposed, he should not relieve himself from it.

In *Sykes v. Holloway*, 81 Fed. Rep., 438, the court say:

> It seems to us upon principle the pecuniary condition of the transferee of stock in a national bank at the time of transfer, while material upon the inquiry of whether or not the transfer is *bona fide* or colorable, cannot be a decisive element on the question of the liability of the transferrer where the transfer has been made out and out without notice or knowledge of the failing condition of the bank.

The case at bar is much stronger than the one cited, because the transfer was made in contemplation of the insolvency of the bank.

In *Foster v. Lincoln*, 74 Fed. Rep., 382, the court, by Wheeler, district judge, says:

> In *Johnston v. Laflin*, 103 U. S., 804, Mr. Justice Field, in speaking of the entry of the transfer on the books of the bank, said: "It is necessary to protect the seller against subsequent liability as a stockholder." Creditors of the bank, when becoming such, have a right to rely upon the responsibility of the shareholders, as shown by the books at that time. The defendant, Benjamin F. Lincoln, appears to have been under liability to the creditors of the bank when this transfer was made. These statutes seem to intend that this liability should not be impaired by transfer, and especially should it not be by a transfer merely voluntary.

In *Cox v. Montague*, circuit court of appeals, sixth circuit, 78 Fed. Rep., 845, the court say:

> It is not necessary, in order to hold liable for an assessment upon the shareholders of an insolvent national bank one who has transferred his stock to an irresponsible person, to show that the transferrer had actual knowledge of the insolvency of the bank at the time of the transfer, but it is sufficient if he had good ground to apprehend its failure, and made the transfer with intent to relieve himself from individual liability.

The supreme court lays down the proper rule in *Bowden v. Johnson:*

> That is no reason why Johnson should not *at the election of the creditors* still be treated as a shareholder—he having, to escape liability, perpetrated a fraud on the statute.

It is not necessary for us to rest our case on the proposition here advanced, as the insolvency of Gruetter & Joers is clearly and convincingly established.

Mr. Gruetter, in answer to the question as to his insolvency, used the following language:

> Counting the bank stock as worthless, and assuming that

we should be liable for the assessment of $15,000, we could not have paid. *That is to say, if we counted the bank stock as worthless we might have had about $3,000 to pay the $15,000 assessment with, provided that our stock which we had at that time in the corporation was worth dollar for dollar. But if it had been necessary by suit to realize money out of the assets we would have been out at least $10,000 instead of being able to pay the assessment.*

Q. You may state whether the firm of A. T. Gruetter & Co. and the persons to whom this stock was transferred by respondent Stuart would be able at the present time to pay this assessment of one hundred cents on the stock, or any part if it, in event that suit was brought and judgment obtained.

A. *No, sir.* (Record, 148.)

On cross-examination the following questions and answers were given:

Q. Was the firm of A. T. Gruetter & Co. solvent before they made this trade?

A. Yes, sir, they were.

Q. And could have paid their debts?

A. Yes. (Record, 150.)

This evidence is somewhat explained and qualified on further cross-examination:

Q. Gruetter & Joers were apparently solvent, were they not, on the 7th day of December, 1892?

A. *If we collected and sold our stock for what it was worth at regular prices we could pay our debts; yes, sir.*

Q. And you would not have been insolvent then if you had not been disturbed in the ordinary and regular course of business?

A. A. T. Gruetter & Co.? No, sir.

Q. And you have not been disturbed in the ordinary and regular course of business have you, as you went out of business?

(No answer.)

Q. Are the debts of A. T. Gruetter & Co. discharged?

A. No, I am sorry to say, they are not. We intended to sell the bank stock and take the proceeds and discharge them.

Q. How much were the debts of A. T. Gruetter & Co. at that time?

A. I could not tell you exactly, but we owed for merchandise bills $15,000 east, which had to be paid, and then we had to pay $1,000 commission to Crooks in making the sale, and we owed considerable for borrowed money to parties in Chicago and the bank here. * * *

Q. I understand you to say in your direct examination that if this stock paid out dollar for dollar, and you were permitted to conduct your business in the ordinary way, that the firm then would not be insolvent?

A. *Considering whether we were liable for the* $15,000, *if we were not liable for that, then of course we could pay out, but if we were called upon to pay the* $15,000, *we would have been busted right away.* (Record, 152.)

In redirect examination Mr. Gruetter testified as follows:

Q. Mr. Gruetter, can you tell what the liabilities were, approximately if not accurately, of Gruetter & Joers at the time you purchased this stock?

A. Well, what would you want me to include? The mortgages?

Q. Yes, include everything. If you have a memorandum you may refresh your memory from that. * * *

A. Of course it would be hard for me to give you the correct figures unless I turn to the books; of course I can tell by looking at the books, *but as near as I can recollect it must have been* $90,000 *which we owed.*

Q. That includes the mortgage on the building, does it?

A. Yes, sir.

Q. Do you remember how much you owed the First National Bank?

A. $20,000.

Q. You owed $15,000 for merchandise, and $1,000 for commission. Was there any more than that?

A. Yes, there was a good deal more of borrowed money. We owed $7,500 to Louie Meyer at that time.

Q. Were you surety or indorser on any paper that you have since paid?

A. I paid $5,000 for my brother-in-law as security.

Q. Were you on that paper at that time?

A. Yes, sir.

Q. Did you owe any other bank than the First National Bank?

A. Not a bank; it was mostly private parties we owed. (Record, 154.)

A careful reading of all Gruetter's testimony proves that the transferees of the stock were insolvent and financially incapable of responding to the assessment of the stock.

They were owing, including the mortgage, about $90,000. (Record, 154.) Stuart assumed $30,000 and paid them $19,500 in cash, which would wipe out $50,000 of their indebtedness and leave $40,000 unpaid. Their merchandise was worth $30,000, so they lacked ten thousand dollars of having enough to pay their debts.

On pages 154, 155 of record Gruetter gives a partial schedule of his liabilities:

First National Bank	$20,000
Merchandise	15,000
Commission	1,000
Louie Meyer	7,500
Security debt of brother-in-law	5,000
Mortgage on building	30,000
Total	$78,500

These were not all the liabilities, as there were others due to private parties.

If we, however, accept the above figures as approximately correct, the account would stand as follows:

Stuart assumed the payment of	$30,000
Value merchandise	30,000
Money receied from Stuart	19,500
Total.	$79,500

This would leave a balance of about $1,500 to pay the stock assessment of $15,000. In other words, Gruetter testifies that the trade broke the firm and that they were unable to pay the assessment of $15,000, but could pay on the assessment from $1,500 to $3,000, *providing they could get dollar for dollar for their stock.*

It makes no difference whether Gruetter & Joers were insolvent before the trade or whether the purchase of worthless stock broke them. The important question is were Gruetter & Joers able to pay the assessment when called for by the comptroller. From the standpoint of the creditor it is not of the slightest import who or what caused the insolvency. If the stock had remained in the name of Stuart, the creditors could have recovered the assessment; now that it is in the hands of Gruetter & Joers, no recovery can be had against them, because they are financially irresponsible.

Counsel for Stuart makes the remarkable claim that we cannot recover because, but for the trade, Gruetter & Joers were solvent. This is pleading his own wrong as a defense. Stuart in effect asserts that Gruetter & Joers were solvent before the trade and at the time he unloaded the worthless stock on them, and therefore he sold the stock to a solvent transferee. The true logic of the transaction is this: Gruetter & Joers were solvent, but Stuart made them in-

solvent by imposing upon them a stock *liability*, instead of a stock *asset*, so that at the very moment that Gruetter & Joers took the stock they were insolvent. In other words, Stuart took from Gruetter & Joers part of their equity in the building exchanged, worth $18,000, and gave them nothing for it, thereby crippling their liability to pay their debts and made them insolvent.

The argument of counsel for appellant that Gruetter & Joers were entitled to count as an asset the amount recovered by them in this action, and that such asset made them solvent, is, to say the least, fantastical. It is not absurd for counsel for the appellant to assert that Gruetter & Joers can recover nothing from Stuart, and yet in the same breath assert that if the court finally decided against his client such decree is an available asset to Gruetter & Joers, which made them solvent at the date of the transfer of the stock?

It is the madness of logic to assert that the possibility of recovery—at best a contingent asset—should be taken into account by the court in determining the solvency of Gruetter & Joers. If the position of Stuart is correct, that he owes Gruetter & Joers nothing, is he not estopped from asserting that the receiver should treat it as a valuable asset? Is not the receiver justified in taking Stuart at his own word? In any event the receiver could hardly look upon this lawsuit as an asset until it was in decree and paid. Moreover, the chances of collecting it were exceedingly slim, as Stuart had put all of his property out of his hands to avoid all liabilities arising out of the failure of the bank. We therefore reassert our entire faith in the proposition that Gruetter & Joers were insolvent at the time they received the stock.

We have now shown conclusively that the bank was hopelessly insolvent; that Stuart sold his stock with knowledge

of its insolvency and with the intent to escape liability; that his transferees were insolvent. We were not required to go so far, but having done so, our case is made out and the decree should be affirmed. The findings of the lower court upon these questions are not to be lightly set aside, and only when the clear weight of the testimony is against them.

Metropolitan Nat. Bk. of Pittsburgh v. Rogers, 53 Fed. 779, and cases cited.
Evans v. Bank, 141 U. S., 107.
Furrer v. Ferris, 145 U. S., 132.
Betts v. Mugridge, 154 U S., 644.
Hill v. Woodbury, 49 Fed., 138.
Tyler v. Campbell, 106 U. S., 322.
Durand v. Martin, 120 U. S., 366.
Hewitt v. Campbell, 109 U. S., 103.
Hathaway v. First Nat. Bank, 134 U. S., 494.
Stuart v. Hayden, 72 Fed., 406.

G. M. LAMBERTSON,
AMASA COBB,
A. E. HARVEY,
F. M. HALL,
Solicitors for Appellee Kent K. Hayden, Receiver.

MAR 7 189
JAMES H. McKENN
C

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 141.

AMBROSE P. S. STUART,

Appellant,

v.

KENT K. HAYDEN, RECEIVER OF CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA, ET AL.,

Appellees.

No. 198.

AUGUST T. GRUETTER AND CHARLES F. JOERS,

Appellants,

v.

AMBROSE P. S. STUART AND KENT K. HAYDEN, RECEIVER, ET AL.,

Appellees.

MOTION FOR MODIFICATION OF DECREE AND BRIEF.

G. M. LAMBERTSON,

Solicitor for Kent K. Hayden, Receiver, Appellee.

STATE JOURNAL CO., PRINTERS AND STATIONERS, LINCOLN, NEB.



In the Supreme Court of the United States.

OCTOBER TERM, 1897.

AMBROSE P. S. STUART, *Appellant*, v. KENT K. HAYDEN, RECEIVER OF CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA, ET AL., *Appellees.*	No. 151.
AUGUST T. GRUETTER AND CHARLES F. JOERS, *Appellants*, v. AMBROSE P. S. STUART AND KENT K. HAYDEN, RECEIVER, ET AL., *Appellees.*	No. 160.

G. M. LAMBERSTON, *Solicitor for Kent K. Hayden, Receiver, Appellee.*

MOTION FOR MODIFICATION OF DECREE AND BRIEF.

Comes now Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, and moves the court for a modification of the decree of the court in the above entitled suits so as to provide:

First—For the affirmance of the decree entered by the circuit court of the United States for the district of Nebraska as to Kent K. Hayden, receiver, and a reversal as to Gruetter & Joers, cross-complainants in the court below.

Second—Providing for the allowance of interest on the amount of the stock assessment and on the decree of the circuit court since its rendition.

Notice of this motion has been served upon counsel for appellant and proof of service is filed with the clerk.

G. M. LAMBERTSON,
Solicitor for Appellee.

SIR: The supreme court will be moved as aforesaid on Monday the 7th day of March, 1898, or as soon thereafter as counsel can be heard.

G. M. LAMBERTSON,
Solicitor for Appellee.

To C. C. FLANSBURG, ESQ.,
Solicitor for Appellant.

BRIEF IN SUPPORT OF MOTION.

First—This suit was commenced in the circuit court of the United States for the district of Nebraska by Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, against Ambrose P. S. Stuart, to recover $15,000 and interest on a stock assessment made by the comptroller of the currency on 150 shares of stock held by Stuart in the Capital National Bank of Lincoln, Nebraska. On the 23d of April, 1895, a decree was entered in favor of Hayden, receiver, against Stuart for $15,000, together with interest at the rate of 7 per cent from the 10th day of July, 1893, amounting in the aggregate to $16,875.42. (See record, 220.)

Second—A decree was also entered in favor of Gruetter & Joers, cross-complainants, for $20,905. (See record, 220.)

Third—On appeal to the United States circuit court of appeals for the Eighth Circuit, the case was reversed and remanded to the court below with instructions to enter a decree to the effect that the transfer of one hundred and fifty shares of stock from Stuart to Gruetter & Joers was fraudulent and voidable as to the receiver, Hayden, that it be held for naught as to him, and *that he recover of Stuart the assessment levied thereon with his costs;* that appellees Gruetter & Joers are entitled to no relief against Stuart in this suit; that their cross-bill be dismissed and that Stuart recover of them his costs. (See record, 237.)

Fourth—The decree of the supreme court simply affirms the decree of the circuit court of appeals but fails to allow interest either on the assessment made by the comptroller or on the decree rendered by the circuit court.

Fifth—As the interest on $15,000 at 7 per cent interest from the date the comptroller made the assessment, to-wit, July 10, 1893, amounts to over five thousand dollars, it is important to the trust which Mr. Hayden represents to have the mandate of this court direct the circuit court to enter a decree with interest.

Sixth—The effect of the decision of the court of appeals was to reverse the decision of the circuit court as to Gruetter & Joers and affirm it as to Hayden, receiver.

Gaines v. Rugg, 148 U. S., 228.

Such being the clear intention of the court, the failure to direct the lower court to enter a decree for the amount of the assessment, with interest and costs, was doubtless an inadvertence. The allowance of interest by the lower court was not assigned as error by counsel, was not discussed in the briefs, nor alluded to by the court. No reason can be assigned why an assessment on bank stock made by the comptroller should not bear interest. If by fighting a case five years interest can be avoided, then every stockholder would refuse to pay. To so hold is to give a litigious stockholder, who puts the receiver to delay, cost, and expense, an advantage over a stockholder who pays his contractual and statutory obligation when the same falls due.

In *Casey v. Galli*, 94 U. S., 677, where the order was to collect the full amount of the par of the stock, the supreme court say: "The sum to be paid being liquidated and due and payable when the comptroller's order was made, it follows that the amount bears interest from the date of the order. Otherwise there would be no notice to pay promptly and no equality between those who should pay then and those who should pay at the end of a protracted litigation."

Seventh—In Nebraska it is provided that on "money due and withheld by unreasonable delay of payment, interest shall be allowed at the rate of seven per cent per annum." See sec. 4, chap. 44, Comp. Stat., 1897, page 692.

Sec. 3, same chapter, provides as follows: "Interest on all decrees and judgments for the payment of money shall be from the date of the rendition thereof at the rate of seven dollars upon each one hundred dollars annually until the same shall be paid."

Section 966, Revised Statutes of the United States, it is provided that interest "shall be calculated from the date of the judgment at such rate as is allowed by law on judgments recovered in the courts of such state." See rule 23 of Supreme Court.

It therefore seems clear that under the law of the state, the statutes of the United States, and the decision of the supreme court, that Hayden as receiver of the Capital National is entitled to recover judgment for $15,000 and interest from the 10th day of July, 1893, to the 23d day of April, 1895. On that day judgment was entered for $16,875.42, which should bear interest at the rate of 7 per cent per annum until paid.

We contend that the court should affirm the decision of the circuit court with interest and costs. This would carry out the plain import of the decision of the court of appeals and the statutes cited, and would not be in conflict with the decision of this court or the court of appeals.

In another aspect of the case it is important that the decree of the circuit court be affirmed as to Hayden receiver, instead of setting it aside and entering a new judgment for the amount of the assessment less the interest. If the judg-

ment is affirmed the receiver of the bank will have the first lien on Stuart's real estate, if a new decree is entered other judgments since entered aggregating $50,000 may be given precedence over the decree entered in favor of appellee.

We think the motion for the modification of the decree and for an instruction to the lower court to allow appellee interest on his claim and decree should be sustained.

G. M. LAMBERTSON,
Solicitor for Kent K. Hayden, Receiver, Appellee.

Since filing the motion, the following confessi
motion has been filed by Counsel for Appellant:
" Comes now appellant, Ambrose P.S. Stuart, and c
motion of the appellee, Kent K. Hayden, received, fi
praying for a modification of the decree heretof
in this cause, and consents that the decree be mo
as to affirm the decree of the Circuit Court for
of Nebraska, with interest at seven per cent on a

Ambrose P.S. Stuart, Appellant,
by, C.C. Flansburg, Att'y. for
Appellant, Ambrose P.S. Stuart."

n of the

nfesses the
ed herein
re entered
ified so
the District
id decree.

In the Supreme Court of the United States.

AMBROSE P. S. STUART,
Appellant,
v.
KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK,
Appellee.
No. 481.

G. M. LAMBERTSON, *Solicitor for Appellee.*

MOTION TO ADVANCE.

The appellee, by G. M. Lambertson, his counsel, respectfully moves the court to advance the same on the docket for hearing during the present term.

Suit was brought in the circuit court of the United States against the appellant to recover a stock assessment of 100 per cent on 150 shares of the capital stock of the Capital National Bank which the receiver alleged had been fraudulently transferred by the appellant, Ambrose P. S. Stuart, about a month before the failure of the bank.

A decree was rendered in favor of the appellee, Kent K. Hayden, receiver of the Capital National Bank, in the cir-

cuit court of the United States for the district of Nebraska, which was subsequently affirmed at the December, 1895, term of the United States circuit court of appeals for the eighth circuit. The amount of the decree is $16,785.42.

The Capital National Bank became insolvent on the 23d day of January 1893, when a receiver was appointed. The creditors are very numerous, and the claims against the bank exceed the assets by one million dollars.

The administration of the affairs of the bank have been delayed by the pendency of this suit, and the trust needs money for current expenses and to pay creditors. A dividend of only 15 per cent has been paid.

The bank's affairs have been in process of liquidation four years, and can be shortly wound up if a speedy hearing can be had in this case.

Notice of this motion has been served upon counsel for appellant, and proof of service is filed with the clerk.

An affidavit of the comptroller is herewith submitted in support of this application.

G. M. LAMBERTSON,
Solicitor for Appellee.

SUPREME COURT OF THE UNITED STATES.

AMBROSE P. S. STUART,
Appellant,
v.
KENT K. HAYDEN, RECEIVER OF THE CAPITAL NATIONAL BANK,
Appellee.
No. 481.

AFFIDAVIT.

DISTRICT OF COLUMBIA, ss:

James H. Eckles, being duly sworn, says, that he is the comptroller of the currency.

That the above entitled suit was brought by the receiver of the Capital National Bank of Lincoln, Nebraska, to recover a stock assessment on one hundred and fifty (150) shares of capital stock of the said Capital National Bank held by appellant, which was transferred by him about one month before the failure of the bank.

The creditors are very numerous, and funds are needed to pay current expenses as well as creditors.

The affairs of the trust are in such a condition that on the determination of the foregoing action the trust can be shortly wound up.

The bank failed January 23, 1893, and a receiver was shortly thereafter appointed.

JAMES H. ECKLES.

Sworn before me this 12th day of December, 1896.

[L. S.] JAS. H. FITZPATRICK,
Notary Public.

SIR: The supreme court will be moved as aforesaid, on Monday the 1st day of February, 1897, or as soon thereafter as counsel can be heard.

G. M. LAMBERTSON,
Counsel for Appellee.

To C. C. Flansburg, Esq., Lincoln, Nebraska, Solicitor for Appellant.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1897.

STUART *v.* HAYDEN.

GRUETTER *v.* STUART.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 151, 160. Argued December 9, 10, 1897. — Decided January 10, 1898.

One who holds shares of national bank stock — the bank being at the time insolvent — cannot escape the individual liability imposed by the statute by transferring his stock with intent to avoid that liability, knowing or having reason to believe, at the time of the transfer on the books of the bank, that it is insolvent or about to fail.

A transfer with such intent and under such circumstances, is a fraud upon the creditors of the bank, and may be treated by the receiver as inoperative between the transferrer and himself, and the former held liable as a shareholder without reference to the financial condition of the transferee.

The right of creditors of a national bank to look to the individual liability of shareholders, to the extent indicated by the statute, for its contracts, debts and engagements, attaches when the bank becomes insolvent; and the shareholder cannot, by transferring his stock, compel creditors to surrender this security as to him, and force the receiver and creditors to look to the person to whom his stock has been transferred.

If the bank be solvent at the time of the transfer, that is, able to meet its existing contracts, debts and engagements, the motive with which the

transfer is made is immaterial, as a transfer under such circumstances does not impair the security given to creditors; but if the bank be insolvent, the receiver may, without suing the transferee and litigating the question of his liability, look to every shareholder who, knowing or having reason to know, at the time, that the bank was insolvent, got rid of his stock in order to escape the individual liability to which the statute subjected him.

Whether, the bank being in fact insolvent, the transferrer is liable to be treated as a shareholder in respect of its existing contracts, debts and engagements, if he believed in good faith, at the time of the transfer, that the bank was solvent — not decided; although he may be so treated, even when acting in good faith, if the transfer is to one who is financially irresponsible.

Where the Circuit Court and the Circuit Court of Appeals agree as to what facts are established by the evidence, this court will not take a different view, unless it clearly appears that the facts are otherwise.

THE case is stated in the opinion.

Mr. C. C. Flansburg for Stuart.

Mr. G. M. Lambertson for Hayden. *Mr. Amasa Cobb*, *Mr. A. E. Harvey* and *Mr. F. M. Hall* were on his brief.

Mr. John H. Ames for Gruetter.

MR. JUSTICE HARLAN delivered the opinion of the court.

On the 6th day of February, 1893, the Comptroller of the Currency appointed a receiver of the Capital National Bank of Lincoln, Nebraska, which had a nominal capital of three hundred thousand dollars. The bank had shortly before suspended business, and upon due examination had been found to be insolvent.

Subsequently, June 10, 1893, that officer — having first determined that in order to pay the debts of the bank it was necessary to enforce the individual liability of shareholders as prescribed in sections 5151 and 5234 of the Revised Statutes — made an assessment for three hundred thousand dollars, to be paid by shareholders equally and ratably on or before July 10, 1893. Of this assessment and requisition Stuart had proper notice.

In execution of this order the receiver brought the present action against Stuart.

Stuart became the owner of one hundred shares of the stock of the Capital National Bank in 1884, and of fifty additional shares in 1886. Substantially from the time of becoming a shareholder he was one of the directors of the bank, and a member of its finance committee, and acted in both capacities until about December 16, 1892. On the last named day, Gruetter & Joers, dealers in furniture at Lincoln, sold to Stuart certain real property in that city for $67,500, upon which there was at the time a mortgage for $30,000 bearing interest at the rate of six per cent per annum. The terms of the contract were that Stuart should assume the mortgage debt, deliver to Gruetter & Joers his stock in the Capital National Bank as of the value of $18,000, meet the taxes on the property, which then amounted to $250, and pay the balance of the price in cash; Gruetter & Joers to take a lease of the real estate for ten years, at $6000 per year. At the time of this agreement, Stuart paid $1000 to bind the bargain. On the 22d day of December, 1892, Gruetter & Joers made their deed to Stuart for the real estate; and Stuart delivered to them his certificates of shares of stock, having signed the blank forms of powers of attorney endorsed thereon, and paid the balance of the agreed price in cash, the taxes on the property and the interest that had accrued on the mortgage.

On the 3d day of January, 1893, the certificates of stock, with the blank powers of attorney endorsed thereon, were returned to the bank, and new certificates were issued to Gruetter & Joers.

The bank closed its doors within less than three weeks after the stock was transferred on its books to Gruetter & Joers, its total assets being about $900,000, and total liabilities $1,463,013.17. Its bills receivable on hand were $519,600, of which $58,596.82 were good, $141,393.27 were doubtful, and $319,611.90 were worthless. Its bills receivable not on hand amounted to $141,000, of which only $10,000 were worth anything.

Opinion of the Court.

The original bill was against Stuart alone. But a demurrer for want of parties having been sustained, an amended bill was filed against Stuart, Gruetter and Joers.

The amended bill alleged in substance that, at the time of the transaction between Stuart and Gruetter & Joers, the former was fully advised of the failing condition and insolvency of the bank, and transferred his stock to them in anticipation of its early failure and the necessary enforcement of the liability of shareholders for the benefit of creditors, and with the intent to evade such liability and to defraud the creditors of the bank. The relief sought was a decree setting aside the transfers of stock, and adjudging that Stuart was liable as a shareholder of the bank under the assessment made by the Comptroller of the Currency. It was further alleged by the receiver that Gruetter & Joers were, at the time of the transfer to them of Stuart's stock, pecuniarily irresponsible persons, from whom the amount of such assessment upon each share of the stock so owned and held by Stuart could not be made by legal process or otherwise.

Stuart in his answer insisted that the sale to Gruetter & Joers was an ordinary business transaction, and denied that he had, at the time of his purchase from Gruetter & Joers, any knowledge whatever of the condition of the bank, or that he knew that the bank was then insolvent, or that he expected it to fail; that, on the contrary, he believed it to be perfectly solvent, and sold and transferred his stock without any thought of the enforcement of his liability as a shareholder, and without any intention to evade such liability or to defraud the bank's creditors.

Gruetter & Joers answered, and averred that Stuart made the transfer of stock to them with full knowledge of the failing condition and insolvency of the bank, in anticipation of its approaching suspension and with the intent to defraud the bank, its depositors and creditors, of the security afforded by law to such depositors and creditors, and render it impossible to enforce his liability as a shareholder; also, that Stuart, with the knowledge and intent stated, represented and warranted to them that the bank was in a safe and solvent

condition, and that its stock was reasonably worth $125 per share, or $18,000 in all. They also filed a cross-bill against the receiver and Stuart, in which the relief sought was a decree declaring the transfer of the stock standing in the name of Stuart to be fraudulent and void as against them, as well as against the receiver and the creditors of the bank, and adjudging that Stuart make full restitution to them of the amount at which such stock was received on the contract for the purchase of the real property sold and conveyed to him.

The decree in the Circuit Court recited — though not in the form of a finding of facts — that on and prior to January 3, 1893, Stuart was the owner of and had standing in his name upon the books of the bank the shares of stock above mentioned; that on or about December 16, 1892, and for more than eight years prior to that date, he was a member of the Board of Directors and of the finance committee of the bank; that on both of the above dates he had knowledge of its then existing insolvency; that at the time of the transfer of the stock he represented to Gruetter & Joers that the bank was in a solvent and prosperous condition, and that such representation was made for the purpose of inducing them to purchase the stock, and of evading and escaping his liability as a shareholder for an assessment thereon. It was then ordered, adjudged and decreed that the sale, assignment and transfer of the one hundred and fifty shares of stock of the Capital National Bank was wholly void as against the receiver and Gruetter & Joers; that the sale, assignment and transfer be set aside, cancelled and held for naught; that the stock be reinstated upon the books of the bank in the name of Stuart, who was declared to be the holder and owner thereof; that Stuart, within twenty days from the date of the decree, pay to the receiver the full amount of the assessment against the stock, and that the receiver recover from him the sum of fifteen thousand dollars, together with interest at the rate of seven per cent per annum, from the 10th day of July, 1893, being in the aggregate the sum of sixteen thousand eight hundred seventy-five and $\frac{42}{100}$ dollars; that Stuart,

within twenty days from the date of the decree, make full restitution and payment to Gruetter & Joers of the amount of the purchase price of the stock, to wit, the sum of eighteen thousand dollars, together with interest thereon at the rate of seven per cent per annum, from the third day of January, 1893, being in the aggregate the sum of twenty thousand nine hundred and five dollars; that Gruetter & Joers be relieved from all liability to the receiver for and on account of any assessment on the stock, and in case Stuart neglected to pay each of the aforesaid sums of money, together with the costs of the suit, to be taxed by the clerk, that execution should issue therefor.

Upon appeal to the Circuit Court of Appeals the decree was reversed, without costs to either party, and the cause was remanded with instructions to enter a decree declaring the transfer of stock from Stuart to Gruetter & Joers to be fraudulent and voidable as to the receiver of the bank; that the receiver recover of Stuart the assessment made upon him, with costs; and that Gruetter & Joers were not entitled to relief against Stuart in this suit, and their cross-bill should be dismissed with costs to Stuart. 36 U. S. App. 462. In the opinion of that court it is stated that the evidence justified the conclusion reached by the Circuit Court as to the facts.

From the decree of the Circuit Court of Appeals the present appeals have been prosecuted.

The shares of the capital stock of a national bank are transferable on its books in such manner as may be prescribed by the by-laws or articles of the association, and every one becoming a shareholder by such transfer succeeds, in proportion to his shares, to all the rights and liabilities of the prior holder. Rev. Stat. § 5139.

It is also provided by statute that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Rev. Stat. § 5151.

The principal inquiry in this case is whether Stuart transferred his stock to Gruetter & Joers in order to escape the liability imposed by statute upon shareholders of national banking associations. His contention is that if the transfer was absolute and to persons who were at the time solvent and able to respond to an assessment upon the shares, the motive with which the transfer was made is of no consequence.

This construction of the statute seems to find some support in the general language used in a few cases. But it will be found upon examination that those cases were dealt with upon the basis that the facts therein showed not only an intent upon the part of the shareholder to escape liability by transferring his stock, but that the transfer was either colorable or to a person who was financially irresponsible at the time of such transfer. There is no case in which this court has held that the intent with which the shareholder got rid of his stock was of no consequence; certainly, no case in which the intent was held to be immaterial, when coupled with knowledge or reasonable belief upon the part of the transferrer that the bank was insolvent or in a failing condition.

In *National Bank* v. *Case*, 99 U. S. 628, 631, 632, this court, speaking by Mr. Justice Strong, said that while a shareholder of the stock of a corporation has, generally, a right to transfer his shares, and thereby disconnect himself from the corporation, and from responsibility on account of it, there were limits to that right; that it is not every transfer that releases a stockholder from his responsibility as such; and that "a transfer for the mere purpose of avoiding his liability to the company or its creditors is fraudulent and void, and he remains still liable." And in *Pauly* v. *State Loan and Trust Company*, 165 U. S. 606, 619, where the previous cases in this court were reviewed, it was held to have been established that "if the real owner of the shares [of a national banking association] transfers them to another person, or causes them to be placed on the books of the association in the name of another person, with the intent simply to evade the responsibility imposed by section 5151 on shareholders of national banking

associations, such owner may be treated, for the purposes of that section, as a shareholder, and liable as therein prescribed."

The safety of a national banking association, so far as its creditors are concerned, depends largely upon the security given by the statutory provision entitling creditors to look to the individual liability of shareholders, including the liability of the estates and funds in the hands of executors, guardians and trustees holding shares of national bank stock. § 5152. One who holds such shares — the bank being at the time insolvent — cannot escape the individual liability imposed by the statute by transferring his stock with intent simply to avoid that liability, knowing or having reason to believe, at the time of the transfer on the books of the bank, *Richmond* v. *Irons*, 121 U. S. 27, 58, that it is insolvent or about to fail. A transfer with such intent and under such circumstances, is a fraud upon the creditors of the bank, and may be treated by the receiver as inoperative between the transferrer and himself, and the former held liable as a shareholder without reference to the financial condition of the transferee. The right of creditors of a national bank to look to the individual liability of shareholders, to the extent indicated by the statute, for its contracts, debts and engagements, attaches when the bank becomes insolvent, and the shareholder cannot, by transferring his stock, require creditors to surrender this security as to him, and compel the receiver and creditors to look to the person to whom his stock has been transferred. This court has said that "the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholders." *Richmond* v. *Irons*, 121 U. S. 27, 55, 56. If the bank be sol-

vent at the time of the transfer, that is, able to meet its existing contracts, debts and engagements, the motive with which the transfer is made is, of course, immaterial. But if the bank be insolvent, the receiver may, at least, without suing the transferee and litigating the question of his liability, look to those shareholders who, knowing or having reason to know, at the time, that the bank was insolvent, got rid of their stock in order to escape the individual liability to which the statute subjected them. Whether — the bank being in fact insolvent — the transferrer is liable to be treated as a shareholder, in respect of its existing contracts, debts and engagements if he believed in good faith, at the time of transfer, that the bank was solvent, is a question which, in the view we take of the present case, need not be discussed; although he may be so treated, even when acting in good faith, if the transfer is to one who is financially irresponsible.

The intent with which an act was done may be proved by the declarations of the party concerned, or by facts and circumstances from which the existence of the intent may be reasonably inferred.

Stuart, both in his answer and as a witness in his own behalf, denies that the sale of his stock was with the view of escaping his liability as a shareholder. He states, also, that it was an ordinary business transaction, and so far from knowing at the time that the bank was insolvent, he believed it to be solvent and able to meet its liabilities of every kind.

But the contention of the receiver was sustained by the proof in the cause. It was in evidence that Stuart, for some time previous to the sale of his stock, had been dissatisfied with the conduct of Mosher, the president of the bank. In addition to the latter's duties as president he was in enterprises that required much attention, and which must have interfered with the proper supervision of the affairs of the bank. He was connected with a manufacturing company, an insurance company and a gas company; was interested in a company engaged in the making of staves in Arkansas; was in the skating rink business, and also in the baseball business. In addition, he had a penitentiary con-

tract, and was a legislative lobbyist. All this was well known to Stuart when he sold his stock to Gruetter & Joers. Before that transaction, he had received an "intimation" that the next general dividend would be passed. He also had information that a large amount of the bank's money was "locked up" in real estate, and invested in worthless securities. And he was in a position to ascertain, with at least reasonable certainty, the condition of the bank at or before the sale of his stock to Gruetter & Joers. As a director he signed each of the reports made to the Comptroller of the Currency of the condition of the bank at the close of business on September 25, 1891, December 2, 1891, March 1, 1892, May 17, 1892, and September 30, 1892. He did not sign the report of December 9, 1892. In addition, his membership of the finance committee of the bank gave him peculiar facilities to ascertain how the bank's money was being used by its president. And that he had information that made him somewhat uneasy about the condition of the bank, and its management by Mosher, is shown by his own testimony as well as by his declarations to witnesses, whose intelligence and truthfulness are not impeached by anything in the record, except the denial by Stuart that he said just what those witnesses testified that he did say. Nor is this negatived by the circumstance that Stuart and his wife had each $1250 on deposit in the bank at the time its doors were closed. That may be accounted for by the fact, admitted by him, that he did not expect the bank to fail so soon.

When the bank failed, Mrs. King, the wife of Dr. S. H. King, had $26,105.80 on deposit there. The first intimation she received of the failure was a statement in a morning paper that the bank had closed its doors. She hurried to the residence of Stuart to ascertain what was the matter with the bank. Her account of the interview with him was as follows: "I told him the Doctor had sent me there for him to tell me about the bank, what the condition had been, and if there was anything wrong, and he sat down, and in his good, quiet way told me he did not like the way the bank had been doing for a long time. He said he did not like their going into the

Western Manufacturing Company business, and he said he had a talk with Mr. Mosher about it, and he said he did not like the Arkansas business, and I asked him what that was, and he said it was a stave business, and he said he did not know of any loss of money in it, but he did not like it, and he said from that they went into the skating rink business, and he said then he felt mad, and he said this is not banking, and I told them so, and then he said, when they went into the baseball business, I said it must be stopped; that we must stop that and do a banking business, and not run after these outside affairs, and, as near as I can give it, he said they were mad, but he told them if they did not stop that kind of business he would get out. Q. Who do you mean by them? A. Mosher and Outcalt [the cashier]; and he said one of them swore very badly and used bad language, and he said particularly Mosher, and at this time I said that the Doctor has gone to see Mosher about it, and he said if he has not gone you tell him to go to Outcalt, because he can get the truth out of Outcalt better than Mosher. And I said, Professor, [Stuart] what is the condition of the bank? Why is it closed? He says I have known for quite a while they had some bad debts, such as very poor paper there, amounting to about $136,000, and he says, I did not like the way they were doing. They could not do outside business and that too, and I did not like it. And, of course, anybody who knows Professor Stuart knows that would not be the way of his doing business, and he said he was in hopes they would tide it over, and he said they had some very poor paper, and he spoke of some land in a different county, and at that Mrs. Stuart came in, and he says, you know I have sold out — which I had not known — and he said, well, he had traded his stock for the Gruetter building a short time before. At this juncture Mrs. Stuart came into the room, and she says, 'It don't let you out from being responsible, does it? How long has it been?' Oh, no, he says, and then he spoke about the board of directors."

Being asked to state any further conversation she had with Stuart the same morning in reference to the bank and its condition, the witness proceeded: "He went on and told me

about it, he said he had not liked the management of the bank, and felt anxious about it, and I asked him how long, and he said a long time; and he went on and repeated again what he said before about going off into side business and said he did not like their not being able to declare a dividend, and I asked him this question. I asked him why the bank was not closed in the condition it was, and asked him if he did not know that the bank's capital was impaired, and he said that it was; still he did not know he said about having the bank closed. And I asked if the bank had been closed we could have gotten something out of the bank, and he said he was in hopes they could tide it over, and Mrs. Stuart says, Professor, you did not expect this so soon."

Henry Gerner, a witness for the plaintiff, and a stockholder in the bank, stated that he had a conversation with Stuart before the failure of the bank as to the sale of his stock to Gruetter & Joers. Being asked to state that conversation, he said:

"Well, one afternoon I met the Professor, which was an almost daily occurrence, if I did not see him in the bank I met him on the street, and we passed the compliments of the day and some remarks, and one day in one of our conversations and talks he told me that he was contemplating making a real estate deal. I said 'yes,' 'yes' he says he had a proposition made him to purchase the Gruetter block down here, and it was a trade, and he said if he made the trade at all, it would be trading his bank stock and some money and assuming their liabilities, their obligations, a mortgage on the building for $30,000. I told him I thought it was rather an exorbitant price for the property; that I did not consider the building worth any such money, to which he responded that they were going to make a very good lease; they would take it for ten years — a ten years' lease on the premises at a rental of $6000 a year. I told him I did not think it was possible for those men in the business to pay any such rent, it was too risky. Well, the Professor replied, we have to take some risk. Well, I said, I should rather, if I was in your place, hold my stock and my interest in the bank. I think it is better or

safer. He said he did not like the way they were doing business, he did not like the style, and a large share of the bank's capital was tied up in real estate and there was no prospect of dividends, and he preferred to do his own business and manage his own affairs. That is all there was to that conversation. Q. Did you have any subsequent conversation with him about the matter? A. Well, yes. I guess it was after he made the trade, either he told me about it or I took occasion to remark, I see you made that trade, Professor. Yes, he says, I did; he says, as I told you before I don't like Mosher and Outcalt's ways of doing business, and I shall prefer to manage my own affairs hereafter. Q. Did he, in any conversation you had with him, say anything about the amount of the capital stock of the bank that was tied up in real estate? A. Yes, some 130 or 140 thousand dollars, about 140,000 he said was tied up. Q. Do you remember about the time when the last dividend of the bank was returned? A. It was a dividend of four per cent declared in July, 1892; that is the last dividend I was credited with. Q. Did you have any talk with the respondent, A. P. S. Stuart, as to whether a dividend would be returned the first of January, 1893, or for the close of the year 1892? A. Well, only this, the Professor told me that in all probability there would be no dividend declared in January, owing to the fact that a large amount of the bank's capital was tied up in real estate, and until the amount was reduced and property converted into cash the bank could not pay any dividend."

His cross-examination was as follows: "Q. You say, Mr. Gerner, that he said he did not like the way that Mosher and Outcalt did the business. Did he give you in detail the management of that business he objected to, or was that the sum total of his remarks, that he did not like the way they did business? A. He says, oh, yes, he made comments on Mosher's being in so many things and having so many irons in the fire and paying too much attention to outside matters. As to Outcalt, I do not know whether the Professor made any comments on his conduct or not. Q. And the reason he gave you at that time for getting out was because he wanted

to manage his own business, and he did not like the way they managed the business? A. He did not like the way they conducted the business."

Without referring to other facts and circumstances disclosed by the record, it is sufficient to say that the Circuit Court was justified by the evidence in finding that Stuart, with knowledge of the insolvency of the bank, or at all events with such knowledge of facts as reasonably justified the belief that insolvency existed or was impending, sold and transferred his stock with the intent to escape the individual liability which the statute imposed upon shareholders of national banks for their contracts, debts and engagements. And the bank having been, in fact, insolvent at the time of the transfer of his stock — which fact is not disputed — he remained, notwithstanding such transfer, and as between the receiver and himself, a shareholder, subject to the individual liability imposed by section 5151. We will add, that as the Circuit Court and the Circuit Court of Appeals agreed as to what were the ultimate facts established by the evidence, this court should accept their view as to the facts unless it clearly appeared that they erred as to the effect of the evidence. *Morewood* v. *Enequist*, 23 How. 491; *The Ship Marcellus*, 1 Black, 414, 417; *Dravo* v. *Fabel*, 132 U. S. 487, 490; *Compania de Navigacion* v. *Brauer*, 168 U. S. 104, 123.

In reference to the appeal by Gruetter & Joers but little need be said. The Circuit Court of Appeals correctly held that the cross-bill of Gruetter & Joers attempted to bring into this suit a new and independent controversy, in which the receiver of the bank had no interest, and which could be determined upon facts not material to the issue between the original plaintiff and Stuart. The Circuit Court of Appeals also held the cross suit to be objectionable upon additional and, we think, entirely sufficient grounds. Judge Sanborn, speaking for that court, said: "The supposed cross-bill utterly fails to state a case for rescission, because it does not show that Gruetter & Joers ever returned to Stuart the nineteen thousand five hundred dollars in cash which they received from this trade, or that they ever released Stuart

from his agreement to pay the mortgage of thirty thousand dollars upon the property they conveyed. They could not rescind this trade and recover back that which they gave in exchange, or any part of it, while they retained at least forty-nine thousand five hundred dollars in value that they had received from it. The proof, if it were possible, is more fatal to them than the pleading. The record discloses the fact that they made their election and chose to affirmatively ratify this transaction more than a year before they filed this bill for its rescission. It shows that on January 23, 1893, they brought an action at law against Stuart in one of the courts in the State of Nebraska to recover of him damages to the amount of eighteen thousand dollars for his fraudulent misrepresentation of the value of this stock at the time of the trade. This was in effect an action for a part of the purchase price of the real estate which they had conveyed, although it was in form an action for deceit. It could be brought and maintained on the ground that the sale or trade of the real estate was valid and its title was vested in Stuart, and on no other theory. That suit is still pending. It was a distinct and affirmative ratification of the transfer of this stock and the conveyance of the real estate, after full knowledge of all the facts, and it barred Gruetter & Joers of all right to rescind the trade thereafter. The result is that all that portion of the decree which grants to Gruetter & Joers any relief against the appellant Stuart was wrong."

The decree of the Court of Appeals is affirmed, but without prejudice to the prosecution of any claim that Gruetter & Joers may have against Stuart arising out of the transactions between them.